

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

SLUSH PUPPIE LIMITED,)
)
Plaintiff,) Case No: 1:19-cv-00189-MRB
)
v.) JUDGE MICHAEL R. BARRETT
)
THE ICEE COMPANY,) MAGISTRATE JUDGE BOWMAN
)
Defendant.))

**PLAINTIFF SLUSH PUPPIE LIMITED'S NOTICE
OF FILING DEPOSITION OF DANIEL FACHNER**

Plaintiff Slush Puppie Limited, by and through counsel, hereby gives notice of filing the deposition transcript of Daniel Fachner taken on August 26, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed on this 30th day of August 2021. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Eric Larson Zalud _____
Eric Larson Zalud
Attorney for Plaintiff Slush Puppie Limited

Slush Puppie Limited,

VS.

The Icee Company,

In The United States District Court
Southern District of Ohio
Western Division
Case no. 1:19-CV-00189-MRB

Daniel Fachner

Taken on August 26, 2021

Reporters: A. David Tackla and Christine Schirripa

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

SLUSH PUPPIE LIMITED,

Plaintiff,)

- VS -) Case No.

THE ICEE COMPANY,) 1:19-cv-0189-MRB

Defendant.)

Deposition of DANIEL FACHNER, a Defendant herein,

being called by the Plaintiff as if upon

cross-examination under the statute, and taken before A.

David Tackla and Christine Schirripa, Notaries Public

within and for the State of Ohio, pursuant to the

agreement of counsel, and pursuant to the further

stipulations of counsel herein contained, on Thursday,

the 26th day of August, 2021, at 2:00 p.m., via Zoom

Videoconference, at Tackla Court Reporting, 1801 E. 9th

Street, Suite 1020, Ci

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1 P-R-O-C-E-E-D-I-N-G-S

2 DANIEL FACHNER, of lawful age, a Defendant herein,
3 having been first duly sworn as hereinafter certified,
4 deposes and says as follows:

5

6 CROSS-EXAMINATION OF DANIEL FACHNER

7 BY MR. ZALUD:

8 Q. This is the deposition of Dan Fachner,
9 taken in the case captioned Slush Puppie versus
10 ICEE, et al, pending in the Southern District of
11 Ohio. The deposition is being taken by agreement
12 and subsequent notice as to time and place.

13 Mr. Fachner, we met briefly off the
14 record, I will introduce myself to you on the
15 record. I represent the plaintiff in this case,
16 Frozen Brothers, and a few ground rules. You have
17 just taken an oath. I know you've had your
18 deposition taken before. You realize and appreciate
19 it carries with it all of the obligations of telling
20 the truth as if we were at trial?

21 A. I do.

22 Q. I'm going to be asking you a series of
23 questions. I don't think it's going to be too long.
24 But if you don't understand or hear a question, let
25 me know, and I will either speak up or clarify,

1 otherwise, I will presume you heard and understood
2 the question and will proceed, all right?

3 MR. WOLFSOHN: Object, I mean he
4 can't make any assumptions about what is in your
5 head or what you're presuming.

6 Q. Okay. If you think of something later
7 that relates to a question I asked before, you can
8 feel free to raise it. Mr. Fachner, if you want to
9 take a break at any time, let me know. We just
10 can't take a break while the question is pending.

11 All right?

12 MR. WOLFSOHN: Unless it's a
13 privileged matter.

14 MR. ZALUD: Okay.

15 Q. I didn't hear your answer though, your
16 counsel interjected there.

17 A. I understand.

18 Q. Okay. Thank you. Are you taking any
19 medications that would impact your ability to
20 testify competently and truthfully today?

21 A. I'm not.

22 Q. How is your hearing, can you hear me okay?

23 A. I can hear you fine.

24 Q. Your memory, normal memory?

25 A. I'm not sure I understand your question,

1 but to the best of my knowledge, my memory is
2 normal, yes.

3 Q. Okay. I mean you don't have any medical
4 issues with memory problems, right?

5 A. No, I don't.

6 Q. And we're taking this deposition remotely,
7 by-the-way, I would have come to you, but, that
8 wasn't to be. Are you -- where are you? Are you in
9 your office; home; a room?

10 A. I am in my office in La Vergne, Tennessee.

11 Q. And alone in the office?

12 A. Yes.

13 Q. And do you have any electronic devices,
14 other than this one on at the time?

15 A. I have a cell phone that's on a charger,
16 yes.

17 Q. All right. Your counsel said to me you
18 got to get out of here, what does that mean? What
19 does that mean, you got to get out of here?

20 A. Well, I can't speak for David, but, you
21 know, the time is important, and so, you know, as we
22 could do this in the most timely fashion, that would
23 be wonderful.

24 Q. Good. Well, that's my goal also. And I'm
25 going to ask you a few background questions, but I

1 understand you have already had your deposition
2 taken, so I'm not going to go too deep into anything
3 and then we'll get to the topics related to the
4 hearing on Monday, all right?

5 A. That sounds great.

6 MR. WOLFSOHN: Actually, you agreed
7 to limit it to the topics of the hearing. His
8 deposition's been taken twice by two partners of
9 your firm. So, please, go to the issues on the
10 hearing which is the purpose of this and what you
11 represented to the court.

12 Q. Could you give me your full name, please?

13 A. Daniel John Fachner.

14 Q. And where do you work, sir?

15 A. J & J Snack Foods.

16 Q. And what is your position there today?

17 A. President and CEO.

18 Q. As I understand it from, I think it was
19 some discovery responses or maybe something else,
20 that is a position that you acceded to in October of
21 2020; is that right?

22 A. Yes.

23 Q. Okay.

24 A. Yeah, the CEO position was in October. I
25 took over the president of that company in April,

1 2020.

2 Q. So you're the CEO now?

3 A. I am.

4 Q. And tell me what your duties involve as
5 CEO?

6 A. To oversee the J & J Snack Foods Company,
7 to properly manage it for today and for the future.

8 Q. And what were they as -- what were your
9 duties as president when you became president in
10 April of 2020?

11 A. Almost the same duties with a few extra
12 responsibilities to the Board and some outside
13 investors.

14 Q. And, you know, I agree with your counsel
15 to an extent, I'm not going to dig too much into
16 background, but just in general, how long have you
17 been at that company?

18 A. I have been with the ICEE Company, which
19 is a subsidiary of J & J, since 1979.

20 Q. And the ICEE Company at some point, I
21 forgot the exact year, was acquired by J & J Snack
22 Foods?

23 A. Yes, it was.

24 Q. I think I'm going to try during the course
25 of this deposition just to refer to the corporate

1 entity with which you're affiliated as ICEE just for
2 ease of our communication, if that's okay with you?

3 MR. WOLFSOHN: Objection. I mean
4 it's depending on the context, that may or may not
5 be misleading.

6 Q. Yes, you can always clarify, but it seems
7 to me like a lot of the events we're talking about
8 happened while the corporate name was ICEE, so can I
9 just call it ICEE or is that --

10 MR. WOLFSOHN: The corporate name has
11 not changed. I don't know what you're talking
12 about. If you have questions, just please proceed.

13 MR. ZALUD: I'm not asking you,
14 David. It ain't a question for you. Can I --

15 MR. WOLFSOHN: I appreciate the
16 common touch of the use of the word "ain't."

17 MR. ZALUD: You're building a
18 wonderful record for yourself, as usual.

19 Q. Mr. Fachner --

20 MR. WOLFSOHN: As usual, what does
21 that mean?

22 MR. ZALUD: I'm --

23 MR. WOLFSOHN: You just presented a
24 perjurious witness and another declaration that he
25 admitted was completely false.

1 **Q. So, any way --**

2 MR. WOLFSOHN: Or maybe Miss Kogan
3 didn't tell you about it, because you didn't bother
4 to attend. Anyway, the name ICEE has not changed.

5 I don't know where you're getting this from. If you
6 have a question about a corporate entity, ask about
7 the corporation entity.

8 **Q. How about if I call it -- thank you,**
9 **David. How about if I call it J & J/ICEE, do you**
10 **know what I'm talking about, Mr. Fachner?**

11 MR. WOLFSOHN: Objection. I will
12 object to everything. You can't name the proper
13 entity?

14 MR. ZALUD: I'm just asking the
15 question to the witness. Are you instructing him
16 not to answer?

17 MR. WOLFSOHN: Dan, don't agree to
18 bizarre, vague instructions about what Mr. Zalud is
19 going to assume.

20 **Q. So, go ahead, Mr. Fachner. I don't want**
21 **to fight about everything but your lawyer --**

22 MR. WOLFSOHN: There's no question
23 pending.

24 **Q. Can we just call the corporate entity with**
25 **whom you've been affiliated for 20 years for**

1 purposes of this deposition only, so it goes
2 shorter, ICEE?

3 A. Yes, we can do that, and if I need to
4 clarify it, I will.

5 Q. Thank you. I mean it's quite easy. I
6 know you've had your deposition taken in this case
7 twice, and I have been reminded of that thrice now
8 within the first 10 minutes, but have you had your
9 deposition taken in any other cases before?

10 A. I have.

11 Q. And about how many times has your
12 deposition been taken?

13 MR. WOLFSOHN: I instruct you not to
14 answer. This has already been covered in deposition
15 one. If you're finished, let us know, so we can
16 call it a day. Don't answer unless you've had
17 your deposition taken between October of 2020 and
18 now.

19 BY MR. ZALUD:

20 Q. It sounds like, if I can wade all through
21 all that, it sounds like your lawyer is instructing
22 you not to answer, Mr. Fachner. So, you know, I
23 don't know what I can do about that. I will ask you
24 one more time: How many times have you had your
25 deposition taken?

1 MR. WOLFSOHN: You can ask him
2 whether he's had his deposition taken between
3 October 13th of 2020 and present.

4 MR. ZALUD: Well, that's not what
5 I am asking.

6 **Q. So, how many times have you had your**
7 **deposition taken? I'm going to ask you this on**
8 **Monday. Go ahead.**

9 MR. WOLFSOHN: I instruct you not to
10 answer.

11 **Q. Let me ask you this: Do you know how many**
12 **times you've had your deposition taken in the past?**

13 MR. WOLFSOHN: You can answer yes or
14 no.

15 THE WITNESS: It would be a
16 guesstimate, Eric.

17 **Q. Okay.**

18 A. A few different times. I guess.

19 **Q. All right, that's fine. What did you do**
20 **to get ready for this deposition? And I don't want**
21 **to hear about any conversations with Mr. Wolfsohn or**
22 **Mr. Marandola, but tell me, in general, what you did**
23 **to get ready for this deposition?**

24 MR. WOLFSOHN: You can answer at a
25 high level, Dan.

1 THE WITNESS: I did my best to
2 refresh myself with this case, because it's been so
3 long from start 'til now, and had some conversations
4 with our attorneys.

5 **Q. Did you talk to anyone else other than**
6 **ICEE's counsel about this deposition?**

7 A. No, I haven't.

8 **Q. Did you look at any paperwork or documents**
9 **relating to this lawsuit to prepare for the**
10 **deposition?**

11 A. I --

12 MR. WOLFSOHN: Answer yes or no.

13 THE WITNESS: Yes.

14 **Q. Okay. And what did you look at?**

15 MR. WOLFSOHN: I instruct you not to
16 answer on the ground of work product. Don't answer,
17 Dan.

18 **Q. What kind of documents did you look at?**

19 MR. WOLFSOHN: Objection. Vague.
20 But you can say what kind of documents.

21 THE WITNESS: Documents surrounding
22 the case that we're discussing.

23 **Q. Did you look at some e-mails?**

24 A. I believe that I did look at an e-mail.

25 **Q. Did you look at the contracts that**

1 **underlie the lawsuit?**

2 MR. WOLFSOHN: I instruct you not to
3 answer. Work product. Don't answer.

4 **Q. You're familiar with the contracts that**
5 **underlie the lawsuit, right?**

6 MR. WOLFSOHN: Objection. Vague.
7 Are you referring to the forged one or the real
8 ones?

9 **Q. You're familiar with the contracts that**
10 **underlie the lawsuit, right, Mr. Fachner?**

11 MR. WOLFSOHN: Objection. Vague as
12 to whether you're referring to the one your clients
13 forged or the real contract.

14 **Q. If he doesn't instruct you not to answer,**
15 **you can just answer, so go ahead.**

16 A. Could you be specific with the contracts
17 you're referring to?

18 **Q. Yes. There's one in 1996 and one in 1999.**

19 A. Yes, I have.

20 **Q. When did you see them last?**

21 A. A day ago, yesterday.

22 **Q. Do you have any other, you know, personal**
23 **notes or files of your own about this case, you**
24 **know, we have received over the years a lot of**
25 **documents in discovery, do you have any others that**

1 **you have kept?**

2 MR. WOLFSOHN: I instruct you not to
3 answer beyond the scope. You already answered.

4 THE WITNESS: No.

5 **Q. Calendars, do you have any calendars to**
6 **reflect meetings with anyone from Slush Puppie or**
7 **Frozen Brothers?**

8 MR. WOLFSOHN: I instruct you not to
9 answer. This is not a discovery deposition.

10 MR. ZALUD: It's not a discovery
11 deposition? What is it then? Are you instructing
12 yourself not to answer that, David?

13 MR. WOLFSOHN: I don't need to be
14 rude, but I'm not going to answer your questions
15 unless they deserve a response.

16 MR. ZALUD: You don't mean to be
17 rude? Really? Interesting.

18 MR. WOLFSOHN: If you have any
19 questions that actually bear on what you told Judge
20 Barrett you were going to be asking about, go ahead.
21 If you're finished, let me know.

22 MR. ZALUD: Isn't that the judge's
23 decision, not yours. You ain't the judge, right?

24 MR. WOLFSOHN: You don't need to
25 answer.

1 **Q. Yes, you don't need to answer. What**
2 **business overall is ICEE in?**

3 A. Frozen and unfrozen carbonated beverage
4 business, as well as the service business.

5 **Q. And in how many countries in the world**
6 **does ICEE operate?**

7 A. Approximately, ICEE, meaning ICEE and
8 Slush Puppie combined as a brand underneath the ICEE
9 Company, approximately 15.

10 **Q. Okay. And good clarification, that's an**
11 **excellent definition of what I mean. I mean let's**
12 **call it ICEE going forward in this deposition, okay?**

13 MR. WOLFSOHN: Objection. Vague.
14 What are you talking about?

15 **Q. Is that okay, Mr. Fachner?**

16 A. I will clarify as I said earlier when I
17 believe it needs that clarification.

18 **Q. Okay, thank you. And what are those**
19 **countries?**

20 A. Oh, boy, I believe that I have listed them
21 before. I'm not sure that I'm going to be able to
22 sit here and do that appropriately.

23 **Q. Okay. I mean Great Britain, Ireland,**
24 **Switzerland, Finland, Norway, Denmark, Spain,**
25 **Portugal, Gibraltar, Malta, Greece, that's 11.**

1 Germany, 12. Netherlands, Belgium, that's 13. A
2 couple more, are those all accurate though, the ones
3 I listed?

4 A. Those are accurate, yes, and more.

5 Q. And at least two more?

6 A. At least two more with what you rattled
7 off, maybe more than two more, yes.

8 Q. All right. And are they primarily in
9 Europe then?

10 A. No, the ICEE Company operates outside of
11 Europe as well, we operate in Asia and the Middle
12 East.

13 Q. And are there, do you know some countries
14 where ICEE operates in Asia and the Middle East?

15 A. China, Dubai, Saudi Arabia, to name a few.

16 Q. And I understand that may not be all of
17 them, right?

18 A. No, it is not all of them.

19 Q. I'm pausing, I'm trying to limit my
20 questions to make it shorter for all of us. When
21 was your most recent discussion you've had with
22 anyone from Slush Puppie or Frozen Brothers?

23 MR. WOLFSOHN: Objection. Vague.

24 What do you mean Slush Puppie?

25 Q. Yes, a good point.

1 MR. WOLFSOHN: Do you mean Frozen
2 Brothers?

3 Q. Well, let me just to make it easier for
4 both of us --

5 MR. WOLFSOHN: There are names of
6 entities, is there a problem with just naming the
7 actual entity? So your client in this case is
8 called Slush Puppie Limited, okay? So, if you're
9 talking about that entity, is there a problem
10 referring to that entity? Or would the name change
11 Frozen Brothers Limited, or Ralph Peters & Sons
12 Limited? So, Slush Puppie is a brand that my client
13 owns. So, I don't know why you are wasting time. I
14 think you're a smart enough person to actually know
15 about legal entities. And I think you're smart
16 enough to know what the relevant legal entities are
17 in this case, so, please, if you're talking about a
18 legal entity, use that name.

19 Q. I'm the one wasting time, I see. So, yes,
20 let's call it Slush Puppie LLC or Frozen Brothers.
21 When was the last time you had a discussion with
22 anyone from those companies?

23 MR. WOLFSOHN: Objection. Vague.
24 Answer if you can, Dan.

25 THE WITNESS: It's been over two

1 years ago.

2 Q. So approximately, I won't hold you to it,
3 but 2019, sometime?

4 A. Yes, it could be even be longer than that,
5 but, yes.

6 Q. And I'm not going to go into the history
7 of the relationship, I'm familiar with it and so are
8 you, I'm sure. But when -- well, let me ask you
9 this first: Has the business relationship between
10 ICEE and Slush Puppie LLC/Frozen Brothers ended?

11 MR. WOLFSOHN: Objection. Vague.

12 THE WITNESS: Eric, I might need you
13 to repeat that one more time, I'm not sure I know
14 how to answer your question.

15 Q. Sure. There was a business relationship
16 between what we're calling ICEE and Slush Puppie
17 LLC, now Frozen Brothers for many decades, and is
18 that relationship over in your mind?

19 MR. WOLFSOHN: Objection. Vague.

20 THE WITNESS: We terminated our
21 agreement in June of 2019.

22 Q. So, in your view, that's -- in your view
23 and ICEE's view, that relationship is over now,
24 that's all I'm asking.

25 MR. WOLFSOHN: Objection. Vague.

1 THE WITNESS: That terminated our
2 agreement. You and I are having a discussion today
3 so I still feel like there's some pieces of Slush
4 Puppie U.K. and Frozen Brothers that is still
5 prevalent in our conversation.

6 **Q. Understood. And like I said, I'm not**
7 **going to go into the history, but how long -- when**
8 **did that relationship, as you recall, start between**
9 **the two entities?**

10 A. I don't recall the exact date, but,
11 roughly 12, 13, 14 years prior when we bought the
12 Slush Puppy rights from Dr. Pepper.

13 **Q. Dave, I'm ready for some exhibits. Can**
14 **you do that? Okay. Mr. Fachner, this is Exhibit**
15 **No. 1. If you could take a look at that and tell me**
16 **what that is?**

17 (At this time, Plaintiff's Exhibit 1 was
18 marked for identification purposes.)

19 A. Unfortunately, I no longer can see the top
20 of this page to understand where it came from. I
21 can begin to read it from the -- thank you. There
22 we go.

23 **Q. There we go. And thank you for that. If**
24 **you ever are having problems seeing something, it's**
25 **just a matter of us adjusting it here.**

A. This looks like an e-mail from Steve Every
to Mark Peters.

3 Q. And he says, "Thank you," it looks like he
4 is forwarding an inquiry from someone in Cyprus, is
5 that accurate?

6 A. That's what it looks like he's referring
7 to.

8 Q. Okay. So, Steve Every is an ICEE employee
9 at the time?

10 A. He is.

11 Q. And he's sending a lead in Cyprus to Mark
12 Peters?

13 A. Yes, in 2012.

14 Q. Got it. The next exhibit, Dave.

15 (At this time, Plaintiff's Exhibit 2 was
16 marked for identification purposes.)

17 Q. Exhibit 2, Mr. Fachner, if you take a look
18 at that and tell me what that is?

19 A. This is a letter from Steve Every to Mark
20 Peters asking if he would have an interest in
21 representing the ICEE brand and product in Spain.

22 Q. So ICEE is sending a lead in Spain to Mark
23 Peters, right?

24 A. For clarification, this is around an FCB
25 program with the ICEE brand, yes.

Q. Got it. The next exhibit, please, Dave.

(At this time, Plaintiff's Exhibit 3 was marked for identification purposes.)

Q. And then is he able to scroll down to see other pages of it? Okay. You want to go back to the first page?

A. Yes.

Q. Sure. There we go.

A. And the question?

Q. What is this?

A. This is an e-mail from Steve Every to Mark Peters regarding a license for the Japan area.

Q. And it looks like you're copied on this one, right?

A. I am copied, I have not read past this cover page though.

Q. Is it accurate to say that ICEE is proposing a deal with Slush Puppy Ltd. for some opportunity in Japan?

A. As my memory serves me, Mark Peters asked for some opportunity to do something in Japan and this is a response from Steve Every to Mark Peters' request.

Q. And is Japan, getting back to the scope of operations, is Japan one of the countries in Asia in

1 **which ICEE operates today?**

2 A. We have licenses on our products in Japan,
3 yes.

4 Q. Okay. Next exhibit, please, Dave. This
5 is Exhibit 4.

6 (At this time, Plaintiff's Exhibit 4 was
7 marked for identification purposes.)

8 Q. Exhibit 4, Mr. Fachner, if you can take a
9 look at that, and again, tell me what that is?

10 A. It looks like somebody is inquiring about
11 a location or the opportunity for a location in
12 Spain. And it looks like this was forwarded to Rod
13 Sexton, and then Rod Sexton is forwarding it to Mark
14 Peters with a question mark that says, "Sounds like
15 a good location perhaps."

16 Q. So ICEE is sending another lead in Spain
17 to Mark Peters, right?

18 A. Not the way that I read it.

19 Q. Okay. An opportunity, sending Mark Peters
20 a potential opportunity in Spain?

21 A. It looks like a communication off of
22 something that came into an e-mail address to Mark
23 Peters, asking him if this is a good location.

24 Q. All right. We can go to the next one,
25 Dave.

(At this time, Plaintiff's Exhibit 5 was marked for identification purposes.)

Q. Exhibit 5, Mr. Fachner, would you take a look at that one and tell me what that is?

A. This is an e-mail from Rod Sexton to Mark Peters asking him if he's operating in Greece.

Q. So, Rod Sexton of ICEE is sending Mark Peters a potential lead for a distributor in Greece?

A. Well, I don't see the potential lead, I see where he's asking him if he has a distributor in Greece.

Q. This doesn't look like a business opportunity to you?

MR. WOLFSOHN: Objection. Lack of foundation.

Q. You can answer.

A. I think I have answered it, but it feels like a question from Rod Sexton to Mark Peters on whether he operates in Greece.

Q. Let's go onto the next one, Dave. This
the Exhibit 6.

(At this time, Plaintiff's Exhibit 6 was marked for identification purposes.)

Q. Take a look at Exhibit 6, Mr. Fachner, and tell me what that is?

1 A. This is an e-mail from Rod Sexton dated
2 3-12-2009, asking Mark if he operates or is
3 interested in operating in a customer that we have
4 here in the states, and Auntie Annes is the customer
5 in the U.K, and then asking the same question of
6 whether he operates in Greece or in Switzerland.

7 **Q. And it looks like in addition to the
8 opportunity presented in Greece that is a lead in
9 Switzerland that he's sending to Mark Peters, right?
10 He calls it a customer lead, right?**

11 MR. WOLFSOHN: Objection. Lack of
12 foundation.

13 THE WITNESS: As it's related to the
14 U.K., yes.

15 **Q. Well, he says "On another note, we have a
16 customer lead in Switzerland and I think you do
17 business in parts of Europe. Do you want this
18 lead?" How was that not him sending Mark Peters a
19 lead for an opportunity in Switzerland?**

20 MR. WOLFSOHN: Objection. Lack of
21 foundation. Asked and answered.

22 BY MR. ZALUD:

23 **Q. You can answer.**

24 A. The same as I answered before, he's asking
25 the question whether he operates in Greece and in

1 Switzerland.

2 Q. I'm ready for the next one, Dave. No. 7.

3 (At this time, Plaintiff's Exhibit 7 was
4 marked for identification purposes.)

5 Q. This is Exhibit 7, Mr. Fachner, if you
6 take a look at that and tell me what that is?

7 A. This is an e-mail from Steve Every to Mark
8 Peters regarding some information that we got from
9 one of our shows and passing those onto Mark Peters.

10 Q. So it looks like ICEE is sending Mark
11 Peters leads and he calls them leads, leads in
12 Norway, the Netherlands and Germany, right?

13 MR. WOLFSOHN: Objection. Lack of
14 foundation. You can answer.

15 THE WITNESS: That is where these
16 leads are from based off this e-mail.

17 Q. Norway, the Netherlands and Germany,
18 right?

19 A. Yes, that is where these are from, based
20 off the of the e-mail.

21 Q. All right. The next one, Dave. This is
22 8.

23 (At this time, Plaintiff's Exhibit 8 was
24 marked for identification purposes.)

25 Q. Mr. Fachner, take a look at this and tell

1 **the me what this one is, Exhibit 8.**

2 A. This is an e-mail from Steve Every to Mark
3 Peters talking about, um, discussions around the
4 opportunity for him to operate in Japan.

5 Q. So you and Mark Peters are having,
6 quote/unquote "top levels discussions" about this
7 opportunity in Japan?

8 A. Mark Peters and I had conversations about
9 that, yes.

10 Q. And you kept Steve Every in the loop on
11 those top level discussions, right?

12 A. As Steve became involved in the
13 international opportunities, yes.

14 Q. And did that Japanese venture ever come to
15 any fruition?

16 A. No, it didn't.

17 Q. No. 9.

18 (At this time, Plaintiff's Exhibit 9 was
19 marked for identification purposes.)

20 Q. Mr. Fachner, if you can take a look at
21 this Exhibit 9 and tell me what that is. And it's
22 two pages, so I don't know if you're able to scroll
23 yourself or you need us to do it?

24 A. I can try.

25 Q. Our reporter says we'll need to scroll for

1 you, so tell me when you're done with that page and
2 we'll scroll to page two.

3 A. Well, I think actually you have to go
4 backwards up for me to understand what this is.

5 Q. Right, so we'll go to page two at the
6 beginning of the string. And Mr. Fachner, let me
7 know when you're done with this page. I will ask a
8 question about this page and then we'll go to the
9 next page, okay?

10 A. I'm ready for the question.

11 Q. And in the e-mail, September 23, 2008 is
12 from you, right, to Mark Peters with some CC'd
13 people, right?

14 A. Yes, it is.

15 Q. And you're presenting Mark Peters with a
16 possible business opportunity in Belgium?

17 A. For the ICEE branded product, yes.

18 Q. And then let's go to the next, page, Dave.
19 And this as just a continuation of that string,
20 right, Mr. Fachner?

21 A. Yes, it is.

22 Q. And the last e-mail from you on the
23 string, November 9th, 2008, you're telling him that
24 the venture has "everyone's excitement?"

25 A. Yes, that's what it's saying.

1 **Q. Exhibit 10.**

2 (At this time, Plaintiff's Exhibit 10 was
3 marked for identification purposes.)

4 **Q. So, Mr. Fachner, this is Exhibit 10, if
5 you can take a look at that and tell me what that
6 is?**

7 **A. An e-mail from Rod to a potential customer
8 in Greece and then an e-mail from Rod to Mark
9 Peters.**

10 **Q. So it looks like Rod Sexton of ICEE is
11 sending Mark Peters another lead or another
12 opportunity in Greece, right?**

13 **A. Yes.**

14 **Q. No. 11, Dave.**

15 (At this time, Plaintiff's Exhibit 11 was
16 marked for identification purposes.)

17 **Q. So Mr. Fachner, if you take a look at this
18 exhibit and tell me what it is?**

19 **A. A communication with Rod or with Mark
20 Sexton and an interested party in Switzerland and
21 then a forward from Rod Sexton to Mark Peters.**

22 **Q. So, Rod Sexton forwarding Mark Peters
23 another possible lead in Switzerland?**

24 **A. Yes.**

25 **Q. And Rod says to Michelle in the e-mail he**

1 **forwards to Mark Peters, "I have found out that our**
2 **ICEE/SLUSH PUPPIE licensee in the UK does have**
3 **representation in Switzerland, so it may be very**
4 **likely we can accommodate your needs."**

5 A. It looks like, against our contract, Rod
6 is discovered that Slush Puppie U.K. is doing
7 business in Switzerland.

8 Q. That's not what he says in the e-mail,
9 right? Right?

10 A. That's not what he says in the e-mail?
11 I'm not sure I understand your question, Eric.

12 Q. That's all I'm saying, he says, quote, "I
13 have found out that our ICEE/SLUSH PUPPIE licensee
14 in the UK does have representation in Switzerland,
15 so it may be very likely we can accommodate your
16 needs." So, that's what he's telling this lead in
17 Switzerland, right?

18 MR. WOLFSOHN: Objection. Lack of
19 foundation. You haven't established that he's seen
20 this e-mail before, and it's from 2009. I fail to
21 see the relevance for the hearing.

22 Q. You can answer.

23 A. Yes, that's what Rod found out is that he
24 has representation in Switzerland.

25 Q. No. 12.

(At this time, Plaintiff's Exhibit 12 was marked for identification purposes.)

Q. Mr. Fachner, can you take look at this exhibit and tell me what it is?

MR. WOLFSOHN: Objection. Vague.

You can answer.

THE WITNESS: Go ahead and answer the question?

Q. Yes, you can go ahead and answer the question unless Mr. Wolfsohn instructs you not to answer.

A. I'm sorry, I thought I heard David say
don't answer.

MR. WOLFSOHN: No, I said objection.
It's vague when he said what is this about? But go
ahead and answer to the best of your ability,
Mr. Fachner.

Q. Actually, let me correct that for the record, I just said, what is this? But feel free to object, but Mr. Fachner, you can answer.

A. This is an e-mail from a potential licensee of shirts, for the -- I'm not sure I know where it's for. I'm assuming it would be for the U.K. And then an e-mail from me to Mark Peters informing them of that, and suggesting an

1 arrangement for the profits.

2 **Q. Suggesting that ICEE and Slush Puppie**
3 **Limited, splits the profits on this proposed**
4 **licensing deal?**

5 A. Yes, this is a person who is interested in
6 a licensee that we own for the U.K. area, and out of
7 respect for the distributor that we have there,
8 offering up a split in the licensing agreement.

9 **Q. The next exhibit, Dave, is that 12? 13?**
10 **Go ahead.**

11 (At this time, Plaintiff's Exhibit 13 was
12 marked for identification purposes.)

13 **Q. Exhibit 13, Mr. Fachner, if you could take**
14 **a look at that and tell me what that is?**

15 A. Could we enlarge that just one step maybe?

16 **Q. Sure, we can.**

17 A. The bottom half of it, I can't see the top
18 now, but the bottom half of it is an e-mail from
19 Steve Every to Mark Peters, sharing some leads that
20 we got from an IAPPA show in Orlando.

21 **Q. And that's a trade show, right?**

22 A. It is.

23 **Q. And these are leads that Steve Every is**
24 **sending to Mark Peters for opportunities in Germany,**
25 **Denmark and Finland?**

1 MR. WOLFSOHN: Objection. Objection.

2 Hey, Dan, just let me, just try to pause so I can
3 get my objections in. Objection. Lack of
4 foundation.

5 Q. All right, you answered, so let's move
6 onto the next exhibit.

7 (At this time, Plaintiff's Exhibit 14 was
8 marked for identification purposes.)

9 Q. All right, Mr. Fachner, this is
10 Exhibit 14, and if you take a look at that, and we
11 can go through the pages for you, and we will, but,
12 and you just tell me what that document is?

13 A. This is a syrup manufacturing agreement
14 with Slush Puppie Corporation.

15 Q. And it's from 1996, right?

16 A. Yes, it's dated here January 1st, 1996.
17 Executed February 5th, 1996.

18 Q. I want to get some clarity on the
19 contracting parties names, okay? It's my
20 understanding that the Slush Puppie reference in
21 this document is the predecessor to ICEE, is that
22 your understanding?

23 A. Yes.

24 Q. And that the Able Foods entity listed here
25 is the predecessor to Slush Puppie Limited; is that

1 **your understanding also?**

2 A. Yes.

3 Q. Okay. And what was the -- and I'm sorry,

4 **you're familiar with this contract, right,**

5 **Mr. Fachner?**

6 A. I am.

7 Q. I'm going to call it the 1996 contract, is
8 **that okay?**

9 A. Yes.

10 Q. **What was the geographic territory of this**
11 **1996 contract?**

12 A. You're asking me to read the countries
13 listed there.

14 Q. You don't need to read all of them, but
15 **that's the territory, right, the countries that are**
16 **listed on the first page of the 1996 contract,**
17 **right?**

18 A. Yes, as it reads, the areas shall include
19 the following geographical entities.

20 Q. And we don't need, you're right, we don't
21 need to read them all. And let me ask you, you
22 know, we talked about some of the European countries
23 in which ICEE operates. Does ICEE operate in all of
24 these European countries that are listed in this
25 **1996 agreement today?**

1 A. I don't know if I can adequately answer
2 that question.

3 Q. Okay. That's okay. Is it your belief,
4 Mr. Fachner, that Able Foods, later known as Slush
5 Puppie Limited has violated some provision of this
6 contract?

7 A. This contract is a syrup manufacturing
8 contract for them to be able to sell syrups to
9 distributors in those territories and to my
10 knowledge, they haven't violated that portion.

11 Q. And when you say "that portion," I want to
12 just make sure I understand you. Does that mean
13 that you believe that Able Foods, later known as
14 Slush Puppie Limited has not violated a provision of
15 this contract?

16 MR. WOLFSOHN: Dan, make sure you
17 read the whole thing. Have you read it? Are you
18 able to review the contract? He's asking you, yes,
19 he's asking you about the entire agreement.

20 BY MR. ZALUD:

21 Q. But let me ask you this, and by-the-way,
22 we can definitely review it, but, you looked at this
23 yesterday and you're the CEO of the company involved
24 in this lawsuit. In your mind, right now,
25 Mr. Fachner, do you believe that Able Foods/Slush

1 **Puppie has violated any clause in this contract?**

2 **Just in your mind right now?**

3 MR. WOLFSOHN: Take your time and
4 review the contract, Dan, it's a long contract.

5 **Q. But I'm asking you, I mean do you think
6 that ICEE -- do you think Slush Puppie/Able Foods
7 has violated any of the clauses of this contract?**

8 MR. WOLFSOHN: Take your time and
9 read it, Dan. Are you referring to after
10 termination or before termination, sir?

11 **Q. I'm not specifying. I just want to know
12 if the CEO of the movement for a preliminary
13 injunction believes any of the clauses in this
14 contract were violated?**

15 MR. WOLFSOHN: Well, he will go
16 through it and let you know what's been violated.

17 **Q. And Mr. Fachner, in spite of what your
18 lawyer just said, I don't want you to presume there
19 has been a violation, I want to know if you think
20 there has been, all right? Okay?**

21 **A. Eric, you have asked the same question
22 three different ways, I think, but I would like to
23 do is make sure that I have read this all of the way
24 through. My quick answer would be, absolutely, they
25 have sold syrups around these particular territories**

1 and into other spots.

2 Q. Okay.

3 A. So that would be a violation of this
4 agreement.

5 Q. Understood. And thank you for that. So
6 are you done with page one?

7 A. No.

8 Q. Okay. Like Mr. Wolfsohn said, I mean take
9 the time you need to read it. That's fine.

10 A. Okay.

11 Q. Go ahead to page two, yes. And, while
12 you're reading, Mr. Fachner, any underlines on this
13 are mine, so --

14 A. Okay. Page three.

15 Q. Page three, we'll move, and before you
16 start, Mr. Fachner, before I forget, just a
17 follow-up question on something you said before you
18 started reading the document. You said that you
19 believe that Able Foods/Slush Puppie Limited has
20 violated this agreement by selling syrup, is that
21 what you said?

22 A. Could we have the court reporter just
23 repeat that?

24 Q. Repeat what?

25 A. Well, I'm not sure I even understand your

1 question, Eric.

2 Q. Well, I asked you, we don't need to repeat
3 it yet, I mean I remember it.

4 A. Well, then just repeat the question.

5 Q. Sure. My question was: Do you believe
6 before looking at it, you know, in your mind whether
7 there's been any violation by Able Foods/Slush
8 Puppie of this contract? And your answer, and I'm
9 paraphrasing was, well, I haven't read it yet, but
10 off the top of my head, I think that they have sold,
11 manufactured and sold syrups in violation of this
12 agreement?

13 A. Slush Puppie's syrups outside of those
14 territories listed on page one.

15 Q. Okay. And tell me more about that.

16 MR. WOLFSOHN: Objection. Vague.
17 But you can answer.

18 THE WITNESS: I don't know if
19 there's a lot more to tell other than selling Slush
20 Puppie syrups with the Slush Puppie label outside of
21 those countries listed.

22 Q. And like where would that be?

23 A. Can you go back to the list?

24 Q. Yes, page one, please.

25 A. I don't know which territories those would

1 be off the top of my head today.

2 Q. Okay. So you don't know which territories
3 outside of the list of territories is the 1996
4 contract there are in which Slush Puppie/Able Foods,
5 may have sold syrup, is that an accurate
6 characterization?

7 A. I'm not sure which territories those would
8 be today as we sit here, I'd have to get some advice
9 from those people that manage that territory for us.

10 Q. Manage which territory?

11 A. International Slush Puppie business for
12 the ICEE Company.

13 Q. And the information you would be getting
14 from them would be what? What would you be asking
15 them for?

16 A. The territories where this has been
17 violated.

18 Q. I didn't catch the last word, we had a
19 technological glitch there.

20 A. No, the territories where this would have
21 been violated.

22 Q. Are you, Mr. Fachner, going to know some
23 of those territories you think were violated between
24 now and Monday?

25 A. I will ask that question, yes.

1 Q. Could I ask you that if you get any
2 concrete information on that, you convey it to your
3 counsel, and he can decide whether he sends it along
4 to us, but can I ask you that if you look and find
5 something, can you send it to Mr. Wolfsohn?

6 A. Yes, you could ask me.

7 Q. Thank you.

8 MR. ZALUD: And David, if he sends
9 something to you between now and Monday, we'd like
10 to request it. You don't need to answer that
11 request, I'm just making it.

12 Q. Page three, let's go back to page three
13 now, Dave.

14 A. Okay, page four. Okay, can you go back
15 one page, please? Okay, all right. Okay.

16 Q. By-the-way were you writing something down
17 there, Mr. Fachner?

18 A. I was.

19 Q. And what were you writing down?

20 A. A number 17, on page four, I believe it
21 is, I don't know, I asked you to go back to that
22 page, so --

23 Q. Okay. And why is 17 of importance to you?

24 A. I believe it links the two agreements
25 together.

Q. And by the two agreements, do you mean the 1996 agreement and the one that came after this, the 1999 agreement?

A. That is what I meant, yes.

Q. Okay. So let me go back to the question I asked before you reviewed the document, do you believe that Able Foods, later known as Slush Puppie Limited, has violated a specific provision of this contract?

A. I believe this contract gives them the rights to sell syrups in territories listed on the page one, and I believe that they have sold syrups outside of those territories.

Q. But you don't know where?

A. Not today sitting here, no.

Q. Any other violations that you believe were committed by Able Foods, later known as Slush Puppie Limited of this 1996 contract?

A. From this contract only gives them the rights to sell the syrups in those territories.

Q. So that I understand, so that would be the only violation of this contract you believe that you're aware of, right?

MR. WOLFSOHN: Objection.

Mischaracterizes his testimony.

Q. That's why I'm asking, so you can correct me, Mr. Fachner, but go ahead.

MR. WOLFSOHN: Including post-termination, Eric?

MR. ZALUD: Any time.

MR. WOLFSOHN: Okay, thank you.

Q. Should I repeat it?

A. Yes.

Q. Okay, no problem. You know, we're on video, but I can see a furrowed brow there. So, that would be the sole violation you see now of this 1996 contract, and that would be your belief that Slush Puppie/Able Foods sold syrups outside of the geographic territories listed on page one of this contract?

MR. WOLFSOHN: Objection. Compound.

You can answer.

THE WITNESS: That is what I said,
yes.

Q. All right.

A. I believe it.

Q. Okay, let me ask you about something I underlined, page two, now you see I underlined there under three it says, "Slush Puppie," and by-the-way, Slush Puppie would be ICEE as we have established,

1 "may cancel and terminate this appointment by
2 written notice to Manufacturer, Able Foods, for any
3 one of the following reasons." Do you see that?

4 A. I do.

5 Q. And then it lists some reasons, let's go
6 to the next page, Dave. And one of the reasons for
7 which Slush Puppie, now ICEE, can terminate this
8 1996 contract is if Able Foods, later known
9 differently, would file any lawsuit against what was
10 then Slush Puppie and what is now ICEE, right?

11 A. Correct.

12 Q. So, if I understand that, if ICEE, then
13 known as Slush Puppie, would have breached this
14 agreement and Able Foods would have sued ICEE, then
15 known as Slush Puppie, for that breach, then ICEE
16 could have terminated this contract; is that right?

17 A. Can you repeat the question?

18 Q. Sure. I'm just going to call -- I'm going
19 to say ICEE and Slush Puppie, ICEE being the
20 corporation here and Able Foods being the
21 manufacturer as defined in the agreement. If my
22 understanding of this provision of the contract is
23 that if ICEE were to breach this contract and Able
24 Foods would sue ICEE for that breach, than ICEE
25 could terminate the contract?

1 MR. WOLFSOHN: Objection.

2 Mischaracterizes the document.

3 Q. Well, it's a question, so put a question
4 mark on the end, I'm just asking you that, Mr.
5 **Fachner.**

6 A. You can read the document as well as I
7 can, Eric.

8 Q. I know.

9 A. I'm getting a little confused with the way
10 you're supplementing ICEE and Slush Puppie and Able
11 Foods, because, we're Slush Puppie and they are
12 Slush Puppie, so I'm getting a little confused of
13 that, here's what I read, "The voluntary and
14 involuntary petition of Manufacturer seeking relief
15 under any provision of any receivership or
16 bankruptcy law or other law for relief debtors, by
17 Distributor. The filing of any legal action other
18 than for collection on account against SLUSH PUPPIE,
19 its representatives, distributors, customers
20 manufacturers, or supplies."

21 Q. Let me do this, I understand what you mean
22 by confusion. I'll use the names of the companies
23 in this document, all right? All right?

24 A. Okay.

25 Q. So, if Slush Puppie were to breach this

1 **contract --**

2 A. Slush Puppie Corporation?

3 Q. **Yes, Slush Puppie Corporation, thank you.**

4 **If Slush Puppie Corporation --**

5 A. Is Slush Puppie Corporation in your mind
6 us?

7 Q. **Yes, because I'm using the definitions in
8 the document. So, if Slush Puppie Corporation were
9 to breach this contract and Able Foods were to sue
10 Slush Puppie Corporation for that breach, than Slush
11 Puppie Corporation could terminate this contract,
12 right?**

13 MR. WOLFSOHN: Objection. Dan, if
14 you have -- if this is not something that you have
15 thought about, because this is not an issue that was
16 ever raised by Slush Puppie U.K., Slush Puppie
17 Limited or Frozen Brothers Limited, if you don't
18 know, feel free to say, you don't know.

19 MR. ZALUD: Well, it's in the
20 briefing and --

21 MR. WOLFSOHN: No, it isn't, where?

22 MR. ZALUD: Yes, it's in one of
23 your briefs, but --

24 MR. WOLFSOHN: Find our brief, don't
25 make misrepresentations.

1 MR. ZALUD: You neither.

2 MR. WOLFSOHN: It's not in our
3 briefs.

4 MR. ZALUD: It is. Any way --

5 MR. WOLFSOHN: Dan, you don't have to
6 answer the question if this is something you haven't
7 thought about. You're not an attorney. We're not
8 making any representations of your interpretation of
9 this section of the contract.

10 MR. ZALUD: I'm not sure I even
11 understand that.

12 **Q. I mean I'm asking you as CEO of the**
13 **company what you think of a contract that your**
14 **company signed and --**

15 MR. WOLFSOHN: His company didn't
16 sign it. He didn't negotiate it. His company
17 didn't sign it. So, there you go again,
18 misrepresenting things.

19 MR. ZALUD: Um --

20 MR. WOLFSOHN: I don't know what's
21 funny about that. Where do you see his signature on
22 this or any of his designees? They didn't acquire
23 the company until 2006.

24 MR. ZALUD: Right, but I mean are
25 you saying that your client right now, David, and I

1 hate to debate this, but it is not a party to this
2 contract?

3 MR. WOLFSOHN: No, that's not what
4 I'm saying.

5 MR. ZALUD: Okay. Well, I think
6 so.

7 MR. WOLFSOHN: But he doesn't -- we
8 are not -- we are not putting Mr. Fachner on the
9 stand to interpret an agreement. That is not the
10 purpose of what's happening on Monday.

11 MR. ZALUD: Do you believe -- let
12 me ask you this.

13 MR. WOLFSOHN: Yes.

14 MR. ZALUD: Do you plan on
15 introducing this document as an exhibit in your case
16 in chief?

17 MR. WOLFSOHN: Yes, absolutely.

18 MR. ZALUD: Okay. Well, then, I
19 should be able to ask about it.

20 MR. WOLFSOHN: Not his subjective
21 uncommunicated belief about a provision that is not
22 even at issue or a hypothetical that is not at
23 issue. It's not relevant. I mean you can ask him,
24 I'm not instructing him not to answer, but I'm
25 cautioning him not to reveal attorney advice and not

1 to speculate about some legal conclusion that he has
2 no independent thought about. Nor would -- I mean
3 he may have thought about it, he may not have.
4 Let's see what he says. But he didn't negotiate
5 this agreement, and we have never taken the position
6 that he negotiated the agreement and we have never
7 taken the position that we signed it. Is it
8 binding? Yeah, absolutely. You admitted that.

9 MR. ZALUD: There you go.

10 MR. WOLFSOHN: Yes.

11 Q. Any way, it looks like, I mean you've been
12 in this business for a quarter century, I mean it
13 looks to me like if Mark Peters' company thinks your
14 company breached this agreement, and files a lawsuit
15 on it, than your company can terminate this
16 contract, is that what you think?

17 MR. WOLFSOHN: And, Dan, just to the
18 extent that your understanding is based on
19 discussions with counsel, I would instruct you not
20 to answer on the grounds of attorney/client --
21 attorney/client privilege and work product doctrine.

22 Q. I just want to know what you think, you're
23 the CEO of the company that owns this contract, so,
24 I just want to know what you think?

25 MR. WOLFSOHN: Again, to the -- this

is a contract that's in litigation, and has been in litigation and discussions before that involving lawyers. So, Dan, do not reveal any attorney/client advice or attorney/client work product opinion type information.

MR. ZALUD: Yes, and I agree with that. I don't want you to tell me anything Mr. Wolfsohn or Mr. Marandola told you or discussed with you, but it's your company's contract, I just want to know, you know, it's 20 words, I just want to know what they mean to you?

MR. WOLFSOHN: Well, what they mean to him is not relevant to the case.

MR. ZALUD: It is, he's a litigating party to the case.

MR. WOLFSOHN: We're not putting him on to interpret it, there's been no issue about ambiguity.

Q. Go ahead, Mr. Fachner.

MR. WOLFSOHN: Dan, is there anything you can say that wouldn't just be attorney opinion?

MR. ZALUD: You don't need to lead him around like that, you can just object.

Q. Go ahead, Mr. Fachner.

A. I don't think I would have anything to add

1 to this that I haven't discussed with our attorneys,
2 and feel like that would be attorney/client
3 privilege.

4 Q. Do you understand the two sentences that I
5 have underlined?

6 A. Where are you? I only see one underlined
7 sentence.

8 Q. Right, go to the prior page, please.

9 MR. WOLFSOHN: "Should this
10 appointment be terminated, Manufacturer shall
11 immediately cease using SLUSH PUPPIE trademarks."

12 Q. Okay. Do you understand this sentence,
13 "SLUSH PUPPIE may cancel and terminate this
14 appointment by written notice to Manufacturer for
15 any one of the following reasons." Do you see that
16 Mr. Fachner?

17 A. I do.

18 Q. And you understand that, right?

19 A. I understand that "SLUSH PUPPIE may cancel
20 and terminate this appointment by written notice to
21 Manufacturer for any one of the following reasons."

22 Q. Next page, Dave. And do you understand
23 that one of those reasons is "The filing of any
24 legal action other than for collection on account
25 against SLUSH PUPPIE, its representatives,

1 **distributors," et cetera, you understand that**
2 **sentence, right?**

3 A. I do.

4 Q. And you understand that as being one of
5 **the ways that Slush Puppie Corporation can terminate**
6 **this agreement, right?**

7 A. Again, I would want to talk to our
8 attorney to make sure I understand it and not rely
9 on my representation of it, but I do understand that
10 as being one of those reasons.

11 Q. Does that seem fair to you?

12 A. It's the contract as it is written, so it
13 is fair.

14 Q. That by breaching the contract, Slush
15 Puppie Corporation can then terminate it; is that
16 fair?

17 MR. WOLFSOHN: Objection. That's not
18 what the contract says. I mean if you're asking him
19 is it fair for us to be able to terminate a contract
20 where Slush Puppie Limited sues on a forged
21 document? Obstructs justice -- obstructs justice,
22 and it and its attorneys engage in criminal conduct,
23 why don't you ask him that question.

24 MR. ZALUD Well, that's not the
25 question I'm asking.

1 MR. WOLFSOHN: Well, that's the
2 question you should be asking, and move on. Do you
3 have any questions that aren't attorney/client
4 privilege or from 2009 or 2010?

5 **Q. That wasn't attorney/client privilege.**

6 **All I asked is if you think it's fair?**

7 MR. WOLFSOHN: And he said he thinks
8 it's fair.

9 **Q. I didn't hear that. Do you think it's**
10 **fair, Mr. Fachner?**

11 A. What I said is that's the contract, which
12 makes it fair. Did I not say that?

13 **Q. If you did, I apologize, but you said it**
14 **now, so --**

15 MR. WOLFSOHN: He said it twice.

16 **Q. After a lot of prompting. But let's move**
17 **on to the next -- oh, no, hold on. Let me ask you**
18 **something more about this contract. You just read**
19 **the whole thing, right?**

20 A. In a short order, yes.

21 **Q. Does anything in this contract require**
22 **Able Foods to turn over Web sites to Slush Puppie**
23 **Corporation?**

24 A. Well, we may have to go through this one
25 more time for me to find that. I did see a

1 provision of things that they would have to turn
2 over, but I'd have to go back and look again.

3 **Q. All right. Do you want to start at the**
4 **first page or you tell me, we can adjust.**

5 A. Start from where we're at.

6 **Q. Okay.**

7 A. No. 11 talks about things that they would
8 have to stop using immediately.

9 **Q. Do you want to keep looking? Do you want**
10 **to go to a different page or --**

11 A. I'm just highlighting 11.

12 **Q. So, all right. I'm reading it, to me it**
13 **doesn't say that Able Foods is required to turn over**
14 **Web sites to ICEE?**

15 A. Well --

16 MR. WOLFSOHN: Are you testifying?

17 **Q. Do you see that there, Mr. Fachner?**

18 MR. WOLFSOHN: He just said they have
19 to cease using the trademark.

20 MR. ZALUD: Are you testifying?

21 **Q. Do you see anywhere in that sentence you**
22 **just read, Mr. Fachner, any contractual verbiage**
23 **that requires Able Foods to turn over Web sites to**
24 **Slush Puppie Corporation?**

25 MR. WOLFSOHN: Asked and answered.

1 You can answer again, Dan.

2 THE WITNESS: Well, I did answer, in
3 No. 11 it talks about trademarks. And what they
4 would need to turn over. If you're asking in here
5 does it say Web site? It does not say Web site, but
6 I think that is part of what this would be used for.

7 Q. And just so that we're clear, that
8 sentence -- where does it say you have to turn over,
9 I don't see that anywhere, is that in there?

10 A. It does not say it like that, no.

11 Q. Do you want to look through other pages?

12 A. Sure. Let's go back to one.

13 Q. Okay. You don't have to.

14 A. No, no, let's do it.

15 Q. Okay, that is fine. Oh, I've got an idea,
16 while you're looking, could you tell me if there's
17 anywhere in this contract that requires Able Foods
18 to inform customers that it has no right to use the
19 Slush Puppie trademark?

20 A. All right, we can go to page two. All
21 right, page three. I got a fly that wants to -- I
22 feel like you hired a fly.

23 Q. I'm great at killing them, but I'm not
24 there.

25 A. "Upon termination, Manufacturer shall

1 immediately cease using SLUSH PUPPIE trademarks or
2 designs, copyrights, patents, tradenames, signs
3 emblems, insignias, symbols, tokens or other marks
4 used in connection with SLUSH PUPPIE in any manner
5 whatsoever."

6 **Q. That sounds familiar to me, can you direct**
7 **me to where you're reading?**

8 A. No. 11 again.

9 **Q. Okay.**

10 A. We referenced it before, we just didn't
11 discuss it.

12 **Q. All right.**

13 A. "Upon termination, Manufacturer shall
14 immediately cease and desist from further use of any
15 SLUSH PUPPIE trademarks, names, logos, or references
16 in any formally approved business name of
17 Manufacturer shall immediately be changed to delete
18 any reference to the SLUSH PUPPIE products."

19 **Q. And I see it there, and I did not**
20 **underline it so you wouldn't see it, I see it there,**
21 **but what is the significance of that sentence to**
22 **you?**

23 A. I think you asked under termination what
24 that meant and I think this clearly defines what
25 that means.

1 Q. And it doesn't say that Able Foods has to
2 turn anything over to Slush Puppie Corporation,
3 right?

4 A. They have to cease using it.

5 Q. Right. Let me know when you want to go to
6 the next page.

7 A. Just to highlight in 12 it says
8 "Manufacturer shall not during the term of this
9 agreement, or for two years after conduct any
10 business which would directly or indirectly aid in
11 the production, distribution or sale of SLUSH PUPPIE
12 brand syrups, neutral base or flavors."

13 Q. And in the next sentence permits the
14 manufacturer to do some other things though, right?

15 MR. WOLFSOHN: Unrelated to the Slush
16 Puppie brand.

17 MR. ZALUD: Is that testimony? I
18 mean could we just have the witness answer?

19 MR. WOLFSOHN: You're really wasting
20 time, so --

21 MR. ZALUD: Me?

22 MR. WOLFSOHN: Yes, the agreement,
23 you know, we're not offering him. We're not
24 offering him to talk about the negotiations that led
25 to this agreement. And Mark Peters has no

1 recollection of any such negotiations, so --

2 MR. ZALUD: If want to withdraw
3 this as an exhibit to your case in chief, he's your
4 only witness.

5 MR. WOLFSOHN: You seem to be not
6 understanding the law of contract interpretation and
7 I'm not going to give you advice.

8 MR. ZALUD: You don't need to.
9 Please, do not.

10 MR. WOLFSOHN: I obviously do,
11 because you don't seem to understand the difference
12 between being able to enforce a contract as opposed
13 to having somebody stand up and interpret the words
14 in a contract. So those are two different things.
15 Sometimes the negotiating history is relevant,
16 sometimes there's an ambiguity under the Parol of
17 evidence rule or other exceptions, but this is not
18 that case. But, obviously, there's no rule that
19 says that because you don't have a witness who was
20 around at the time of the negotiation, that means
21 you can't enforce a contract. So, no, we're not
22 withdrawing this. Yes, we are claiming there's
23 violations of --

24 MR. ZALUD: I don't want your
25 testimony on that -- stop. Stop.

1 MR. WOLFSOHN: Okay.

2 MR. ZALUD: You stop testifying.

3 MR. WOLFSOHN: You go ask some
4 questions that are actually about facts.

5 MR. ZALUD: You don't determine
6 those.

7 MR. WOLFSOHN: Yes, I do.

8 MR. ZALUD: No, you're not the
9 judge. You are not the judge.

10 MR. WOLFSOHN: I will shut it down.

11 So you have got -- you have got 26 minutes, the same
12 amount I of time you gave me for Mr. Samoren.

13 MR. ZALUD: I'm going to ask
14 questions for as long as I have. You're slowing it
15 down, really. Could we stop fighting? Let me just
16 ask a question. You're slowing it down.

17 Q. Let's go to the next page. Are you done
18 with that page, Mr. Fachner?

19 A. I am.

20 Q. Dave, the next page. Oh, I'm sorry, one
21 more question about that sentence you read about the
22 two years after. Go back to it, please, Dave. You
23 remember this sentence you read, it's in the
24 brackets there, Mr. Fachner, you remember that?

25 A. I do.

1 **Q. Do you believe that Able Foods violated**
2 **that provision?**

3 MR. WOLFSOHN: Dan, you can answer to
4 the extent it is not attorney/client privilege or
5 attorney work product.

6 THE WITNESS: Well, it is
7 attorney/client privilege information.

8 MR. WOLFSOHN: Then don't answer.

9 **Q. Do you know any facts, you, Dan Fachner,**
10 **without talking to your lawyers that would lead you**
11 **to conclude that Able Foods violated this provision?**

12 MR. WOLFSOHN: When he says "Able
13 Foods", I think he means Slush Puppie Limited or
14 Frozen Brothers Limited or its subsidiaries wholly
15 owned by Ralph Peters & Sons and controlled by Mark
16 Peters.

17 **Q. I don't mean all of that, but I mean the**
18 **contracting party, Able Foods, but thank you for**
19 **pointing out the Able Foods.**

20 **A. And your question, Eric?**

21 **Q. Do you, without any kind of attorney**
22 **advice, do you believe there are facts in your mind,**
23 **that would lead you to conclude that Able Foods**
24 **violated this clause?**

25 **A. I have seen pictures of equipment in the**

1 field that still have the Slush Puppie name on the
2 piece of equipment, that would be confusing for
3 sure.

4 Q. And which pictures? What pictures have
5 you seen?

6 A. We have provided pictures of a piece of
7 equipment that still has the Slush Puppie name on it
8 for service.

9 Q. And that would be the machine in Cardiff,
10 right?

11 A. I'm not sure where that was.

12 Q. Okay. So, sorry, let's go onto the next
13 page then, Mr. Fachner?

14 A. Is there a question about this page?

15 Q. Well, you were reading the contract again,
16 yes, the pending question was for each of these
17 pages, does it say anywhere in this contract that
18 there's a requirement for Able Foods to inform
19 customers that it has no right to use the Slush
20 Puppie trademark? I think that's why you were
21 reviewing it in light of that question.

22 A. The next page. And then again, Eric, your
23 question now.

24 Q. Sure. Does it say anywhere in that 1996
25 contract that's there's a requirement for Able Foods

1 to inform customers that it has no right to use the
2 Slush Puppie trademark?

3 A. I don't see that in here.

4 Q. Let's go onto the next exhibit, Exhibit 15

5 (At this time, Plaintiff's Exhibit 15 was
6 marked for identification purposes.)

7 (At this time, another court reporter
8 entered the proceedings until completion.)

9 Q. (BY MR. ZALUD) Mr. Fachner, this is
10 Exhibit 15. Could you take a look at that and tell
11 me what it is?

12 A. It's really poorly copied here, but --
13 that did not make it much better -- but distributor
14 agreement, a 1999 distributor agreement.

15 Q. Yeah. Maybe there's a clearer copy
16 somewhere. This was the clearest one I could find,
17 but I think the subsequent pages are clearer.

18 A. Okay.

19 Q. And to clarify the parties here, this is a
20 contract between Slush Puppie Corporation, which
21 later became ICEE; right?

22 A. Correct.

23 Q. And Slush Puppie Limited, the company
24 affiliated with Mark Peters. So I'm just going to
25 use the names in the contract for questions about

1 this contract. All right?

2 A. Okay.

3 Q. First question is, what is the territory
4 encompassed by this contract? If you know it,
5 that's fine. If not, we can move to the page.

6 A. Well, we should move to the page to be
7 accurate.

8 Q. Okay. It's the last page then.

9 A. Territory described, the United Kingdom
10 and Ireland.

11 Q. So this contract encompasses activities
12 within those territories, the UK and Ireland?

13 A. Correct.

14 Q. I'm going to try to find a way for us all
15 to be more efficient with this one, everyone, so let
16 me ask you this. Before you look through it, do you
17 believe that Slush Puppie Limited has violated this
18 contract?

19 A. Yes.

20 Q. And, you know, we can look through it, and
21 we will, Mr. Fachner, but tell me in what way you
22 believe Slush Puppie Limited has violated this
23 contract?

24 A. They signed distributor agreements for the
25 Slush Puppie brand in areas outside of the United

1 Kingdom and Ireland. They signed licenses
2 agreements around the brand that they did not have
3 the rights to do in places in the UK and Ireland and
4 outside of those areas for products beyond the scope
5 of this agreement.

6 **Q. And what license agreements were those?**

7 A. Agreements to sell T-shirts and other
8 types of products that is beyond what the scope of
9 this agreement is.

10 **Q. And do you have any of those?**

11 A. You mean do I own some of those?

12 **Q. I mean, have you seen any of those?**

13 A. Yes, I have.

14 **Q. Do you have them in your corporate
15 possession right now?**

16 A. I believe that we do. I've seen them over
17 the years. We've provided that information over the
18 years. We've asked them to stop over the years. If
19 it's been sitting here in our archives, I'm not
20 sure.

21 **Q. And if you -- let me ask you this: If you
22 had those, and it sounds like you were saying you
23 do, those would have been produced in discovery in
24 this case; right?**

25 A. Yes, they would have.

1 Q. All right. I'm going to have a couple of
2 questions, very similar to my other ones, about this
3 contract. Do you want to look through it before I
4 ask you them?

5 A. Why don't you ask the question, and then
6 I'll let you know whether I feel like I need to look
7 through it.

8 Q. A fair point. Does this contract, the
9 1999 contract, require Slush Puppie Limited to turn
10 over websites to Slush Puppie Corporation?

11 A. Then we'll need to read through the
12 contract.

13 Q. All right. Are you ready for -- should we
14 go back to -- you read page 1; right?

15 A. We should start at 1.

16 Q. All right. That's fine.

17 A. Okay. I read 1.

18 Q. Go ahead. Go ahead. And, Mr. Fachner,
19 maybe another way to save time is I'm going to have
20 that -- the other question too, is there anything in
21 this contract that requires Slush Puppie Limited to
22 inform customers that it has no right to use the
23 Slush Puppie trademark, so --

24 A. This is really a poor display.

25 Q. Could we enlarge it a little bit more?

1 A. You can give it a shot.

2 Q. Let's give it a shot and see what happens.

3 **That seems better. We'll have to scroll for you.**

4 A. You know what? It was easier for me to
5 read it a little smaller than it is right now. If
6 we could do that.

7 Q. **Sure.**

8 A. Thank you. Rights Reserved under number 3
9 says, Upon any termination of this agreement,
10 distributor shall return to company or effectively
11 destroy all literature, signs, advertising
12 materials, promotional matters, I believe that says,
13 and other materials identifying the former
14 distributor with company or its products and shall
15 immediately cease to identify itself with company or
16 use the marks or any confusing similarity thereof,
17 and shall discontinue -- I'm sorry. Some of this is
18 hard to read -- or change --

19 Q. **-- discontinue or change its company name**

20 --

21 A. -- if distributor employed any such
22 company name or product mark as a part of the
23 distributor's name, logo, or business.

24 Q. **And I think I know the answer, but why is
25 that important, in your mind?**

1 A. You asked if they were to return, and it
2 says, distributor shall return to company.

3 Q. **Return the items listed in that sentence;**
4 **right?**

5 MR. WOLFSOHN: Objection; asked and
6 answered.

7 Q. **(BY MR. ZALUD) You can answer.**

8 A. Yes.

9 Q. **We're near the bottom, so go ahead and let**
10 **us know.**

11 A. You can go to the next page. I really
12 can't read this. It must be easier on your side
13 than it is mine, but this just --

14 Q. **Yeah. I mean, the hard copy is easier,**
15 **but you're right, that's --**

16 MR. WOLFSOHN: Dan, do you have a
17 printer there?

18 THE WITNESS: I have a printer in my
19 office, yes.

20 MR. WOLFSOHN: Why don't we just have
21 him print out a copy of the agreement?

22 MR. ZALUD: That's fine with me.

23 MR. WOLFSOHN: So that's something
24 that you could do, Dan?

25 THE WITNESS: I think so, yeah. Do

1 you want to send that to me? I guess I've got to
2 figure out how to do that from one computer to the
3 next here real quick. Somebody want to send me what
4 they're using, or do you want me to search for that

5 --

6 MR. WOLFSOHN: I mean, don't you have
7 it, the '99 agreement?

8 THE WITNESS: I do, David.

9 MR. ZALUD: You know, David -- let's
10 go off the record for a minute.

11 - - -

12 (Whereupon, a discussion was held off the
13 record.) - - -

14 Q. (BY MR. ZALUD) That's better; right?

15 A. Yes, it is.

16 (At this time, Plaintiff's Exhibit 16 was
17 marked for identification purposes.)

18 Q. Okay. This is Exhibit 16, Mr. Fachner.

19 Could you take a look at that and tell me what that
20 is?

21 A. A declaration page from me.

22 Q. And that was submitted in support of
23 ICEE's motion for preliminary injunction in this
24 case?

25 A. It was.

1 Q. Okay. I'm not going to ask you a question
2 about every line. I've underlined where I'm going
3 to ask you questions to save some time. Number 9,
4 next page, Dave -- I think we've already covered 9;
5 right? You've listed the countries you were able to
6 recall where the ICEE -- the Slush Puppie trademark
7 is registered by ICEE; right?

8 A. Yes.

9 Q. I mean, I understand you might not know
10 all of them off the top of your head, but -- then
11 let's go to number 15, so page 4. So I've
12 underlined a portion of 15 there, and you're
13 declaring that specifically Slush Puppie Limited
14 wanted a significantly broader geographic territory
15 for distribution than the 1999 agreement allowed
16 for; right?

17 A. Yes.

18 Q. That we've seen that during this era, ICEE
19 was providing Mark Peters with leads and business
20 opportunities in Cypress, Greece, Spain,
21 Switzerland, Norway, Belgium, the Netherlands,
22 Japan, Denmark, Germany, and Finland: right?

23 MR. WOLFSOHN: Objection:

²⁴ mischaracterizes the testimony and the documents.

Q. (BY MR. ZALUD) You can answer.

1 MR. WOLFSOHN: You can answer.

2 A. Guess while in good faith trying to make
3 sure his agreement lined up with his actions, we fed
4 them some leads for territories that we discovered
5 they were operating in.

6 Q. (BY MR. ZALUD) Number 19, so next page,
7 please. So it -- thank you -- it says, To protect
8 ICEE's in December of 2019, The ICEE Company sent
9 letters to companies in the UK and Europe that we,
10 meaning ICEE, believed had agreements with Slush
11 Puppie Limited for the distribution of Slush Puppie
12 branded products. Do you see that?

13 A. I do.

14 Q. And which companies, Mr. Fachner, did ICEE
15 send these letters to?

16 A. I don't have the list of companies handy,
17 but they were companies that were either using the
18 Slush Puppie mark in conjunction with frozen
19 beverage equipment or companies that were signed up
20 to licensed products, confectionary licenses, shirt
21 licenses, things like that.

22 Q. And you said there's a list of those
23 companies; right?

24 A. There was a list of those companies that
25 we sent the letter to.

1 Q. Okay. Do you still have that list?

2 MR. WOLFSOHN: Counsel, we gave you
3 all those letters, so move on.

4 MR. ZALUD: I'll move on after I hear
5 an answer to this question.

6 MR. WOLFSOHN: We gave you the
7 letters. Why are you wasting his time?

8 MR. ZALUD: I would like to know if
9 he still has the list.

10 A. Yes, we do.

11 Q. (BY MR. ZALUD) Moving on to 22, you see I
12 -- that's my writing there. I labeled 22A, and 22B.
13 Well, we may have already talked about this. Never
14 mind. We already discussed this in the context of
15 the contract, so we can skip that. I'm busy trying
16 to save everyone's time.

17 Number 25.

18 MR. ZALUD: And let's show the start
19 of 25, Dave. I'm sorry, 24.

20 Q. (BY MR. ZALUD) And it talks about Rose
21 Marketing there. I understand that Rose Marketing
22 Company, a company that sells candy, is still
23 displaying Slush Puppie products on its website.
24 Rose Marketing is not an authorized licensee of
25 ICEE, but instead appears to have been illegally

1 **authorized by SPL. Do you see that?**

2 A. I do.

3 **Q. What does that mean, appears to have been**
4 **illegally authorized by SPL?**

5 A. That at one point, Rose Marketing had an
6 agreement with Slush Puppie Limited to sell products
7 that Slush Puppie Limited didn't have the rights to
8 give them.

9 **Q. And you submitted a second declaration.**
10 **Really it looks like it was specifically relating to**
11 **Rose Marketing; right?**

12 A. We did.

13 Q. All right. Let's move on from this
14 exhibit and go to the next exhibit, please.

15 (At this time, Plaintiff's Exhibit 17 was
16 marked for identification purposes.)

17 Q. Do you want to read this, Mr. Fachner? I
18 mean, we -- you are perfectly willing -- you know,
19 you're perfectly fine with doing it. You know, it's
20 your declaration, but --

21 A. Well, let's hear the question and --

22 Q. Sure. Yeah. I get it.

23 A. If you could go back and read it again.

24 Q. I get it. My interpretation of this
25 declaration, tell me if I'm right or wrong, is that

1 **as of the date of this second declaration, ICEE has**
2 **no complaint now against Frozen Brothers relating to**
3 **Rose Marketing in these preliminary injunction**
4 **proceedings; is that accurate?**

5 A. I had my dates wrong in the original
6 declaration. We had sent out these letters that you
7 referenced earlier, and then we signed a legal
8 license agreement with them, and I believe that was
9 in October or so, and when I wrote the declaration,
10 we had already done that, and so I'm correcting my
11 dates on this.

12 Q. **Understood. And so, I mean, for purposes**
13 **of our hearing Monday, you have no complaint right**
14 **now about ongoing activities of Frozen Brothers**
15 **related to Rose Marketing; is that accurate?**

16 MR. WOLFSOHN: Objection; asked and
17 answered. Mischaracterizing his testimony.

18 MR. ZALUD: That's why I wanted to
19 clear that up.

20 Q. **(BY MR. ZALUD) You can go ahead.**

21 MR. WOLFSOHN: You can answer the
22 question.

23 A. We do not have any claims upon them.
24 That's been cleared up.

25 Q. **(BY MR. ZALUD) Thank you. And were any**

1 other statements in your first

2 Declaration wrong also?

3 A. Certainly not that I'm aware of.

4 Q. All right. I appreciate the correction of
5 the second declaration. Thank you.

6 Let's go to the next exhibit.

7 (At this time, Plaintiff's Exhibit 18 was
8 marked for identification purposes.)

9 Q. So, Mr. Fachner, these are the
10 interrogatory responses submitted by your counsel on
11 behalf of ICEE, specifically with regard to the
12 preliminary injunction hearing. I'm going to go
13 through them, and if I pause, it's just because we
14 may have already covered things and I won't need to
15 ask you questions.

16 MR. ZALUD: Let's go to the next
17 page, Dave.

18 Q. (BY MR. ZALUD) So number -- interrogatory
19 number 42 -- yeah. I'm going to go to your answer,
20 which is -- I think is on the next page, so go
21 ahead.

22 THE WITNESS: Whoever is blowing that
23 up, it can stay the size that it is for me. It
24 would be better than the expanded size.

25 Q. (BY MR. ZALUD) Got it. And that

1 sentence, it starts on the prior page, it says, Mr.
2 Fachner will testify about the irreparable harm that
3 ICEE has suffered and will suffer if the requested
4 injunction is not entered, including lost sales
5 opportunities, lost retailer/customer relationships,
6 and the loss of control over the Slush Puppie brand
7 in Europe and the UK. Do you see that?

8 A. Yes, I do.

9 Q. So what lost sales opportunities are you
10 referencing there?

11 A. The opportunity to be able to sell Slush
12 Puppie in those territories, and not to have it
13 confused by it being retired or put out to pasture
14 or misrepresented.

15 Q. And just so I'm clear, ICEE is operating
16 in those territories; right?

17 A. We have now signed an agreement, a new
18 agreement, with somebody to operate in those
19 territories.

20 Q. And is there any specific sales
21 opportunities that you can identify that ICEE has
22 lost?

23 A. I would identify every retailer that had
24 the Slush Puppies brand on it that has been told
25 that it has been retired or put out the pasture is a

1 lost opportunity.

2 Q. Do you have any specific names?

3 A. We have had specific questions, that we've
4 provided emails from customers who are interested in
5 the Slush Puppie brand that were confused by the way
6 that it had been handled.

7 Q. Okay. So I'll have a couple question
8 about those. And then maybe you already answered
9 this too, but it says you're going to testify that
10 ICEE has lost retailer customer relationships. Is
11 that the same thing as the lost sales opportunities
12 we just discussed?

13 A. Where are you highlighting that?

14 Q. It's -- I was about to point to it on my
15 point screen. It's in that underlined portion.

16 A. It's the same sentence. I see it. Failed
17 opportunity, loss of retail customer relationships.
18 That absolutely is the same point as I have already
19 made. When those customer -- retail customer
20 relations have been misled, that certainly requires
21 us to go back out there and undo those false
22 accusations that it's been retired, that it's been
23 put out to pasture.

24 Q. And those specific retailers are going to
25 be in the emails that were produced; right?

1 A. Again, I would argue every customer.

2 Q. And then it says you'll testify about --
3 and I'm still on that same underline -- the loss of
4 control over the Slush Puppie brand in Europe and
5 the UK. I just want to understand what you mean by
6 that.

7 A. Well, I would refer to those domains that
8 haven't been turned over to us, and/or go to a
9 domain, it's a dead end. And so as you go to a dead
10 end, a person would naturally assume that this brand
11 no longer exists.

12 Q. Got it. I underlined 44, but we can skip
13 that.

14 MR. ZALUD: So, Dave, next page, and
15 let's move on to page 6.

16 Q. (BY MR. ZALUD) And that is -- that's
17 number 45. And, Mr. Fachner, if it's okay, I'll
18 just read you what that interrogatory is and ask you
19 about a portion of your answer. Want to try that?

20 A. Sure.

21 Q. Okay. With respect to ICEE's allegations
22 that Slush Puppie devalued ICEE's brand by holding
23 onto domain names using the name Slush Puppie, state
24 a detailed description of all facts that support
25 that allegation, persons with knowledge of it, and

1 documents that support it. So that's the question.
2 And I just had a question for you about a part of
3 that answer. And I underlined it.

4 The answer of ICEE to that is, in part,
5 SPL, however, is attempting to thwart those efforts
6 by informing retailers that Slush Puppies products
7 are no longer available in the UK, Ireland, and
8 Europe, and instead attempting to convince retailers
9 to switch to SPL's new Slushy Jack product. Do you
10 see that?

11 A. I do.

12 Q. The first part of that that's not
13 underlined, what -- which retailers are you aware of
14 that SPL informed that Slush Puppie products are no
15 longer available in the UK, Ireland, and Europe?

16 A. Well, they sent a letter out to all of
17 their customers.

18 Q. Okay. So the letter is what you're
19 referring in this part of the sentence; right?

20 A. Absolutely part of what we're referencing,
21 sure.

22 Q. Okay. And then you said that, Instead --
23 and this is the part I underlined, Slush Puppie --
24 SPL is attempting to convince retailers to switch to
25 SPL's new Slushy Jack product. Do you see that?

1 A. I do. I do.

2 Q. No. I heard you. I mean, isn't that just
3 -- isn't that part of it, just competition in the
4 marketplace?

5 A. I don't know if that was a question or a
6 statement.

7 Q. I'm asking you, isn't attempting to
8 convince --

9 MR. WOLFSOHN: He's asking -- he's
10 trying to convince you they are forgeries, they're
11 blatant illegal conduct, they're a violation of the
12 contracts, they're a willful violation of trademark
13 law, their defamation of your company is okay. So
14 that's the question on the table. Isn't that just
15 normal competition? Yeah. The same way when you
16 guys supporting perjury and litigating a case that
17 you know contains fraudulent documents, that's just
18 practicing law.

19 MR. ZALUD: Tremendous speech, David.

20 Q. (BY MR. ZALUD) Anyway, that wasn't my
21 question. Your lawyer doesn't know my question.

22 My question is: Isn't attempting to
23 convince retailers to switch to SPL's to a new
24 Slushy Jack product, isn't that part of just
25 competition in the marketplace?

1 MR. WOLFSOHN: Are you going to send
2 us those communications, Counselor? You haven't
3 sent us any other than two from Ms. Peters. Are you
4 going to send us the emails?

5 **Q. (BY MR. ZALUD) You can answer.**

6 MR. WOLFSOHN: Are you going to send
7 it to us? You going to produce it?

8 **Q. (BY MR. ZALUD) You can answer, Mr.
Fachner.**

9 A. Not in the fashion in which they have done
10 it, no.

12 **Q. But you recognize -- you've been in the
13 business for a long time. I mean, beverage
14 manufacturers can and do compete with one another;
15 right?**

16 A. I've never had a distributor so blatantly
17 abuse a court system in the way that this
18 distributor has. And so, no, I've never faced
19 competition of a fashion where they have held at bay
20 in a court system a brand while they were able to
21 convince customers to put in a different brand by
22 blatantly saying this brand is old and tired -- is
23 going to be retired. Not that I don't own it
24 anymore, not that I can't provide it for you any
25 longer, but that it's retired and put out to pasture

1 while we provide in the court system a legal
2 document that was forged. No, that is not the kind
3 of competition, Eric, that I have ever faced.

4 **Q. Got it.**

5 A. And I have faced a lot of great
6 competitors to date. None of them have ever lied to
7 the court system while they run out and put up the
8 different brand on equipment and call it fair
9 competition.

10 **Q. Understood.**

11 A. I don't know. I don't know if you do by
12 the question that you asked me.

13 MR. WOLFSOHN: He does not understand
14 it. He thinks what he's doing is fine.

15 MR. ZALUD: Yeah. Asking questions
16 is fine.

17 MR. WOLFSOHN: Supporting perjury,
18 aiding and abetting, obstruction of justice, you
19 think that's fine? Apparently, you do, because you
20 did it again this morning. After all we've been
21 through, you did it again this morning.

22 Unbelievable. And having an associate go and
23 represent the guy because you knew he was going to
24 lie and he had sworn out a false affidavit, you, as
25 a partner, sending that associate. Shame on you.

1 Shame on you.

2 MR. ZALUD: Well, let me know when
3 you're done.

4 MR. WOLFSOHN: I'm done.

5 MR. ZALUD: Thank you.

6 **Q. (BY MR. ZALUD) Let me ask you this, Mr.**
7 **Fachner: Aren't they supposed to change the brand?**
8 **I mean, isn't that what they're supposed to do?**
9 **They're supposed to stop using the Slush Puppie**
10 **brand; right?**

11 A. Yes, they are supposed to stop using the
12 Slush Puppie brand.

13 **Q. Okay. Let's go to --**

14 A. Not partially, entirely. Not when they
15 choose to, everywhere. Not in bits and pieces, but
16 everything. Not some ways, but always. Not where
17 convenient.

18 **Q. And do you believe they're still using the**
19 **brand somewhere today as you and I talk?**

20 A. You didn't see the picture we talked about
21 earlier where there was Slush Puppie in some way, in
22 any way on that machine? Did you see that?

23 **Q. I saw the picture. It was on some**
24 **nameplate in the back, but it was there. I agree.**

25 A. It was on a nameplate just for

1 clarification, on a nameplate, on a piece of
2 equipment that had Slushy Jack all over it. That's
3 not confusing?

4 Q. I saw it. So anyway, let's move to page
5 8, which is -- there we go. I bracketed that
6 because it's too long to read. SPL's continued
7 Slush Puppie presence on social media is unlicensed
8 and unauthorized by ICEE -- and I'm not going to
9 read the rest of it. I mean, my only question to
10 you there is, what did you mean by SPL's continued
11 Slush Puppie presence on social media? What do you
12 mean by that?

13 A. Excuse me. I have gotten something caught
14 in my throat all of a sudden.

15 Q. No problem.

16 A. Their use of the websites and not turning
17 over the domains of those.

18 Q. So that's what you mean by social media in
19 this phrase?

20 A. Yes.

21 Q. By the way, if you need to get a drink of
22 water just -- oh, got it. Good.

23 Let's go to page 10. So we were talking
24 about -- I think this is the machine we were talking
25 about. Is that right, Mr. Fachner?

1 A. Yes. Although, again, there is a picture.
2 It's hard for me to see, but we'll see what your
3 question reads.

4 Q. That was -- that was my only question on
5 that. And then the next page has, I think, what you
6 were referring to.

7 MR. ZALUD: So, Dave, go ahead.

8 A. Okay.

9 Q. (BY MR. ZALUD) And so is that what you
10 were referencing, where it's got the reference to
11 Slush Puppie 300 milliliters there?

12 A. Yes.

13 Q. So as part of the relief that ICEE is
14 seeking for this preliminary injunction, you would
15 want that portion of what's labeled on this machine
16 to be either removed or painted over or in some
17 fashion where the Slush Puppie name would not be
18 visible to people in the store; is that accurate?

19 A. Well, it's part of the contract that we
20 went through during this deposition that said that
21 all of that would have to be turned over and
22 released. Absolutely I would not want Slush Puppie
23 confused with Slushy Jack. I would not want someone
24 to have the authority to water down our name while
25 they're out there presenting their own.

1 Q. So turned over or returned or destroyed;
2 right?
3

4 A. Yes.
5

6 Q. Okay.
7

8 A. However it was described in that
9 paragraph.
10

11 Q. We're done with that exhibit, but hold on.
12 Let me -- let's go to the next exhibit. This is
13 Exhibit 19.
14

15 (At this time, Plaintiff's Exhibit 19 was
16 marked for identification purposes.)
17

18 Q. Mr. Fachner, you haven't seen this, but
19 you can take a look at it and then I'll have a
20 couple of questions to you about it.
21

22 A. Could I see who it's from and to?
23

24 Q. Sorry. Just scroll down a little bit. We
25 see the top on the screen, but not the from.
26

27 MR. WOLFSOHN: What's the date?
28

29 MR. ZALUD: August 24th, 2021.
30

31 Q. (BY MR. ZALUD) So I don't know what we
32 can do here. I mean, it -- the one line you're not
33 seeing is the sent -- the date above this Jonathan
34 Perry line, August 24, 2021, and the from, Kevin
35 Scoles at Frozen Brothers, so we can't get it on the
36 screen. I could ask you a couple of questions, but
37

1 **if you're not comfortable with that, I won't.**

2 A. Let's try them and I'll tell you if I'm
3 comfortable.

4 **Q. Okay.**

5 MR. WOLFSOHN: Well, you know, I
6 mean, this is some email that you haven't produced
7 to us, so I'm instructing him not to answer. You
8 can't manufacture this thing, after Laura Peters'
9 deposition, send out this note, and then spring it
10 on us at a deposition when you haven't produced it.
11 So he's not answering any questions about this.

12 MR. ZALUD: You didn't have any
13 discovery requests.

14 MR. WOLFSOHN: I don't care.

15 MR. ZALUD: I know you don't.

16 MR. WOLFSOHN: We have all kinds of
17 discovery requests. We absolutely do.

18 MR. ZALUD: Yeah, but not related to
19 the preliminary injunction hearing.

20 MR. WOLFSOHN: Well, I'm not -- I
21 stand by my instruction. I'm not going to argue
22 with you.

23 **Q. (BY MR. ZALUD) Okay. Let me ask you**
24 **this, Mr. Fachner: Hypothetically, if someone were**
25 **to peel off that Slush Puppie sticker from that**

1 machine, would that alleviate your concerns about
2 that particular machine?

3 MR. WOLFSOHN: Objection; vague.

4 Q. (BY MR. ZALUD) You can answer.

5 A. I'd answer it completely different, Eric.

6 I would never expect that somebody would put a
7 different name and my name on one machine, and at
8 that point, it's unacceptable to me because that
9 creates confusion in the marketplace and is unfair
10 competition while destroying the Slush Puppie brand.

11 Q. Understood. Are you saying there would be
12 no way to -- how would you correct that?

13 A. I wouldn't have done it to begin with. I
14 wouldn't use those kind of tactics. And I've been
15 in business, as you said, for a long time, and I've
16 never had anybody do that before.

17 Q. So in your view, that -- having that
18 sticker on there is not correctable, it's not
19 correctable by taking the sticker off?

20 A. In my view, it's done damage to the Slush
21 Puppie brand.

22 Q. Let's skip the next one.

23 MR. ZALUD: I'm saving us time, Dave.

24 THE VIDEOGRAPHER: We're going to 21?

25 MR. ZALUD: Yeah. Oh, they're

1 already labeled?

2 THE VIDEOGRAPHER: They've been
3 labeled on this.

4 MR. ZALUD: Got it.

5 (At this time, Plaintiff's Exhibit 21
6 was marked for identification purposes.)

7 Q. (BY MR. ZALUD) Mr. Fachner, this is -- I
8 believe this is a chart that you compiled and
9 produced in this case. Is this what it is?

10 MR. WOLFSOHN: Yeah. And he was
11 already examined on this, so do you have anything
12 that wasn't gone over in the second deposition on
13 this?

14 Q. (BY MR. ZALUD) Aren't these your damages
15 for the actions of Slush Puppie Limited?

16 MR. WOLFSOHN: I instruct you not to
17 answer. Just because you're the new kid on the
18 block, although you weren't the original lawyer on
19 this case, doesn't give you the right to take up a
20 CEO's time asking questions about a document that
21 was already marked at his deposition in October. So
22 you can read that transcript. You also have -- I
23 assume Mr. House is still at your firm. You can
24 call him up and talk to him.

25 MR. ZALUD: I hope you get paid by

1 the word.

2 Q. (BY MR. ZALUD) Are these the damage
3 categories that you're --

4 MR. WOLFSOHN: I know you get paid by
5 the forged word and the perjurious word.

6 Q. (BY MR. ZALUD) Are you -- I could answer
7 all of these, but I'm not. Are you, Mr. Fachner,
8 claiming damages other than these that you already
9 laid out in this hearing on Monday?

10 MR. WOLFSOHN: Those damages are not
11 for this hearing.

12 MR. ZALUD: I'm just asking the
13 witness, not you.

14 MR. WOLFSOHN: Objection. The
15 question makes no sense. Damages are not for a
16 preliminary injunction hearing.

17 Q. (BY MR. ZALUD) Go ahead. You can answer.

18 A. You want to ask the question again?

19 Q. Aren't these the categories of damages
20 you're claiming in your preliminary injunction
21 motion?

22 MR. WOLFSOHN: I don't know what
23 you're talking about. These are damages. You
24 already asked him about this.

25 Q. (BY MR. ZALUD) Don't these represent lost

1 sales and lost customers, these numbers you got
2 here, Mr. Fachner?

3 A. They do. I'm not saying this is inclusive
4 of all damages.

5 Q. Understood. Let me ask you this before we
6 go to the next one. Maybe we can save some time.
7 We can agree, you tell me, that there's lots of
8 third-party marketplaces and services out there
9 selling products that have the Slush Puppie logo on
10 them; right? Like Amazon, eBay, Red Bubble, others
11 like that?

12 MR. WOLFSOHN: Objection; vague.

13 A. I'm not really sure how to answer the
14 question you just asked. Are there other places in
15 this world selling things that have the Slush Puppie
16 logo on it? Authorized licenses? Yes.

17 Q. (BY MR. ZALUD) All right. Let's go to
18 the next exhibit. Exhibit --

19 THE VIDEOGRAPHER: 22.

20 (At this time, Plaintiff's Exhibit 22
21 was marked for identification purposes.)

22 Q. (BY MR. ZALUD) So this is an example of
23 something I'm talking about, Mr. Fachner. I don't
24 want -- you know, there are a lot of pages here. I
25 don't want to go through all of it, but it's a

1 company called Argos. I mean, we can agree that
2 there is third-party companies like this selling
3 Slush Puppie -- they look like branded products.
4 Can we agree on that?

5 MR. WOLFSOHN: Objection. The
6 document hasn't been produced. I don't know what it
7 is.

8 Q. (BY MR. ZALUD) Go ahead.

9 A. We have licensed authorized partners
10 selling Slush Puppie products, yes.

11 Q. Is Argos one of those?

12 A. I assume they are.

13 Q. How about eBay?

14 A. eBay branded products?

15 Q. No. eBay selling Slush Puppie branded
16 products.

17 A. Do you have something you want to show me?

18 MR. ZALUD: Yeah. Skip the next page
19 and go to the third page.

20 Q. (BY MR. ZALUD) So does ICEE have a
21 license agreement with eBay?

22 A. We do not have a license agreement with
23 eBay. We might have a license agreement with who
24 eBay is buying this from.

25 Q. And that would -- that could apply to

1 **Amazon also; correct?**

2 A. Well, again, both eBay and Amazon, they'll
3 produce or manufacture the products in which they
4 sell. So absolutely could something that we have an
5 authorized license with be selling through eBay or
6 Amazon? Yes.

7 **Q. How about someone you don't have an
8 authorized license with?**

9 A. Whenever we discover somebody that we
10 don't have one, we write them a cease and desist
11 letter, and if they cease and desist, then we move
12 on, if not, then we carry it further. Any great
13 brands have people who try to knock them off and you
14 are constantly having to put back those brands.

15 **Q. Thank you.**

16 MR. ZALUD: And we'll go to the next
17 exhibit, Dave.

18 (At this time, Plaintiff's Exhibit 23
19 was marked for identification purposes.)

20 **Q. (BY MR. ZALUD) So these next few are
21 emails that you referenced earlier that were
22 produced in discovery for this preliminary
23 injunction hearing. We served discovery requests.
24 So let's -- I think this is three pages, Mr.
25 Fachner. We'll go from the -- is it easier for you**

1 if we start at the last page, which is the first in
2 the chronology and go forward?

3 A. Yes.

4 Q. Okay.

5 MR. ZALUD: Let's do that, Dave.

6 Q. (BY MR. ZALUD) So that's the -- that's
7 the last page. Are you ready for us to move to the
8 next page?

9 A. I am.

10 THE VIDEOGRAPHER: Okay. Okay.

11 Q. (BY MR. ZALUD) Okay. So what does this
12 email string represent?

13 A. I'm assuming that this was from a customer
14 who was interested in a machine, that's why we
15 presented a picture to it, and then forwarded it
16 over, ultimately, to our new licensee.

17 Q. And are you saying this exhibit somewhat
18 demonstrates confusion between ICEE and Frozen
19 Brothers?

20 A. In this particular email you're asking me,
21 again, if I see -- if I'm saying what?

22 Q. I want to understand if you -- this was
23 produced in -- for this preliminary injunction, so
24 I'm just asking you if you believe that this email
25 string demonstrates some type of confusion between

1 **ICEE and Frozen Brothers?**

2 A. I don't know if I have the full context of
3 this email.

4 Q. You see any evidence of confusion in this
5 exhibit that was produced, though; right?

6 A. I see a picture previously of a Slush
7 Puppie machine.

8 Q. But do you see any evidence of confusion
9 by this potential customer between ICEE and Frozen
10 Brothers from this exhibit here?

11 A. Go back to the previous page. Doesn't say
12 much either.

13 Q. Right. I mean, there's no evidence of
14 confusion from the four corners of this exhibit, is
15 there?

16 A. As you are showing me this exhibit, I
17 don't see the correlation there.

18 Q. It's also from the Maldives; right?

19 A. Yes, it is.

20 Q. And accurate to say the Maldives -- some
21 say Maldives are not in the territory of either the
22 1996 contract or the 1999 contract?

23 A. Correct.

24 Q. And does ICEE even have the mark
25 registered in the Maldives?

A. I don't know that today.

Q. Okay. Let's go to the next exhibit.

(At this time, Plaintiff's Exhibit 24 was marked for identification purposes.)

Q. And again, Mr. Fachner, this is -- it's a string, so I'm presuming, like the others, it would be easier for you if we start at the last page and you read and we go chronologically through the string. Is that okay?

A. Yes.

Q. Okay. Good.

MR. ZALUD: So go to the last page.

THE VIDEOGRAPHER: Okay.

Q. (BY MR. ZALUD) We can blow that up, if you want.

A. Sure. Why don't you do that. Okay.

Okay.

Q. Were you shaking your head a little bit?
I thought I saw you shaking your head when you were
reading it.

A. I might have been.

Q. And why was that?

A. Maybe I was chasing the fly around the room. I'm not sure. I'm not watching myself read. I was watching the page.

1 Q. No problem. I can't fault concentration.
2 I just have a few questions about this. In general,
3 Mr. Fachner, could you tell me what it is?

4 A. It's a trial, so do you want to go back to
5 the beginning then?

6 Q. Yeah. Sure. I mean, you know, if that's
7 your easier -- easier way to explain it, go right
8 ahead.

9 MR. WOLFSOHN: Counsel, are you
10 marking these exhibits? And are you -- are you
11 going to give us copies of them?

12 MR. ZALUD: We're marking them and
13 we're going to give them copies; right?

14 THE VIDEOGRAPHER: All these are
15 numbered.

16 MR. ZALUD: Yeah.

17 THE VIDEOGRAPHER: And we can block
18 them further, but they've all been numbered by your
19 office prior to.

20 MR. ZALUD: Do you hear -- let's go
21 -- we're off the record.

22 - - -

23 (Whereupon, a discussion was held off the
24 record.) - - -

25 Q. (BY MR. ZALUD) Why don't I just ask you a

1 couple of questions about it. First of all, it's
2 dated -- the page we're looking at is dated February
3 11, 2021; right?

4 A. Yes.

5 Q. So about six months or so ago; right?

6 A. Yes.

7 Q. Okay. And it looks to me, and you tell
8 me, it looks like Frozen Brother is telling this
9 Maltese Company that it is rebranding?

10 A. It does look that way. Maybe you can go
11 back to that page if you're going to ask about that
12 page.

13 Q. Yeah. Don't hesitate to call that out.

14 MR. ZALUD: So, Dave, the second
15 page, please?

16 Q. (BY MR. ZALUD) Is that the page, Mr.
17 Fachner? It's probably the second and the third
18 page.

19 A. Yes. It look likes this is from some
20 Rodrigo at Frozen Brothers to an illegally licensed
21 distributor in a particular territory --

22 Q. And --

23 A. -- falsely describing that they have to
24 change from Slush Puppie to be able to use a
25 different kind of product. Like three kinds of

1 wrong in this.

2 Q. And can you see this page?

3 MR. ZALUD: Could we blow this up for
4 Mr. Fachner, the one that's on there? Let's scroll
5 up somehow.

6 Q. (BY MR. ZALUD) It looks like Frozen
7 Brothers tell this Maldives Company that they've got
8 to change all their Slush Puppie branding on
9 everything; right?

10 A. Yes, including websites here even. So
11 they do recognize that websites need to be turned
12 over and changed. It's interesting.

13 Q. Business cards, emails, machines,
14 vehicles, social media, websites; right?

15 A. Websites, social media even. Yes.

16 Q. So in other words, isn't this what they're
17 supposed to be doing in your view or no?

18 A. They weren't supposed to be operating in
19 that territory.

20 Q. But is this what they're supposed to be
21 doing now? Isn't this what they're supposed to be
22 doing, is saying exactly what you've asked, if
23 they're not associated, they got to rebrand --

24 MR. WOLFSOHN: Are you giving us the
25 websites? The website that Peter Splat, who's on

1 this email, has custody of? Are you going to give
2 it to us?

3 MR. ZALUD: I'm just asking --

4 MR. WOLFSOHN: It's outrageous.

5 MR. ZALUD: I'm just asking the
6 question.

7 MR. WOLFSOHN: It's outrageous. It
8 is beyond despicable. This is Peter Splat, who you
9 say you don't know who he is, who has the website
10 that we've been trying to get. So give it to us.

11 Why don't you give us the websites? Why don't you
12 give us the Twitter account that Mark Peters was
13 posting to a year and a half ago, and that then you
14 had this poor Abi Sononum (phonetic) lie about it in
15 declaration submitted in federal court. It's
16 beneath contempt.

17 Q. **(BY MR. ZALUD) Anyway --**

18 MR. WOLFSOHN: Also we permeated on
19 June 25th of 2019, two years and two months ago. So
20 you're saying that this email, which you never even
21 produced to us, until Laura Peters' deposition, that
22 this is okay?

23 MR. ZALUD: You produced this to us.

24 MR. WOLFSOHN: She produced the one
25 that actually went out in the UK.

1 Q. (BY MR. ZALUD) Anyway, Mr. Fachner, none
2 of that was what I was asking. I'm just asking
3 isn't this what you would want to be done? You
4 know, regardless of any proceed wrongs that got us
5 to this place --

6 A. I would want them not to license a
7 distributor in a territory that they don't have
8 clearly defined in this deposition that you forced
9 me to read. I would want that not to have happened.
10 I would want this to be done. Not written to and
11 asked, but done. They no longer own it. I wouldn't
12 want the letter not to falsify information that
13 they're doing this so that they could use a
14 different kind of product, as opposed to we no
15 longer own the Slush Puppie brand, and so we will be
16 bringing something different to you in a territory
17 that I didn't have the rights to give to you to
18 begin with. That's what I would have wanted. And
19 to ask me to sit here and be pleased with this after
20 they've done three wrongs and answer whether I'm
21 happy with it is amazing to me, Eric. It's amazing.
22 I know it is to you too.

23 Q. Okay. I mean, I'm just asking you about
24 -- you know, we're having a hearing Monday on things
25 that ICEE wants to get done and I'm just -- and you

1 **don't have to answer. I'm just asking --**

2 A. In February of this year, as you presented
3 to me, they were told to turn over the websites and
4 the social media. Earlier in the day today, in this
5 four-hour deposition, you wanted to force me to not
6 find websites somehow in a contract that was written
7 back in 1996, but in February, they realized they
8 can't do it and still haven't done it. And you want
9 me to pat them on the back because they sent out a
10 letter.

11 **Q. I'm not -- we don't need to -- I'm not**
12 **asking to pat them on the back. I'm just trying to**
13 **understand independently of past alleged wrongs.**

14 A. Stop abusing our name. Stop using it
15 illegally. Don't find ways now to correct it.
16 Correct it. Don't ask a customer to correct it. Go
17 out and correct it. Don't drag out the court system
18 while you abuse our brand and tear it down. That's
19 what I'm asking for.

20 **Q. All right. Let's go to --**

21 A. If that's your question, that's my answer.

22 **Q. I got it. Let's go to the next one.**

23 (At this time, Plaintiff's Exhibit 25 was
24 marked for identification purposes.)

25 **Q. This is all I have. This was produced.**

1 We served discovery requests for this hearing and
2 this was produced. Maybe it was attached to
3 something else. I don't know. Do you have any idea
4 why this was produced in response to requests for
5 this hearing?

6 A. I do not on its own.

7 Q. It might have been attached to something
8 else. I didn't think you would. Let's move on to
9 the next one.

10 (At this time, Plaintiff's Exhibit 26 was
11 marked for identification purposes.)

12 Q. So, Mr. Fachner, take a look at this
13 Exhibit 26 and tell me what that is. And, again,
14 it's three pages so should we start with the last
15 page for you?

16 A. Yes.

17 Q. All right. We will.

18 A. Unfortunately, we can't see the top of
19 this.

20 MR. WOLFSOHN: I object to the whole
21 way you've been showing the exhibits. You can't see
22 the number, you can't see the full exhibit. I don't
23 know why you can't use any of the solutions that are
24 out there for showing exhibits to witnesses that
25 actually let the witness control the screen and see

1 the document. But I object to this entire
2 examination to the extent you've been showing the
3 witness the exhibits where the witness can't see
4 them, can't read them, can't see the number, I can't
5 see what number they're marked on, can't see the
6 top, can't see the dates. It's not professional,
7 and it's inappropriate.

8 MR. ZALUD: In other words, we should
9 have done this live like I wanted to.

10 MR. WOLFSOHN: No. We've used, to
11 very good effect, with your witnesses, the actual
12 law application. There are other similar
13 applications, but I guess Mr. Peters doesn't want to
14 pay your firm to use them or whatever. I don't know
15 what the reason is, but it is not professional and
16 it's inappropriate.

17 Q. (BY MR. ZALUD) So, Mr. Fachner, are you

—

19 MR. WOLFSOHN: And by the way, Eric.
20 You made a long speech to Judge Barrett about how
21 the only way that the judge and you could evaluate
22 someone's testimony for them to be in the courtroom.
23 So is Laura Peters coming on Monday?

24 MR. ZALUD: I mean, she's not. She
25 can't get in the country.

1 THE COURT: Okay. You didn't tell
2 Judge Barrett that, though.

3 MR. ZALUD: Yes, I did.

4 MR. WOLFSOHN: You said Laura Peters
5 was not coming?

6 MR. ZALUD: Yeah. I told the Judge
7 she's going to be on Zoom.

8 MR. WOLFSOHN: All right. So how are
9 we supposed to evaluate her testimony since she
10 won't be in the courtroom?

11 MR. ZALUD: It's harder. You're
12 right.

13 MR. WOLFSOHN: Uh-huh.

14 MR. ZALUD: I mean, I agree.

15 **Q. (BY MR. ZALUD) Anyway, back to the**
16 **substance of the deposition. Mr. Fachner, so are**
17 **you not comfortable testifying about this because we**
18 **can't see the top? If you're not comfortable,**
19 **that's fine, we'll skip it.**

20 A. These are all really hard to read. And
21 when you can't see the top of it, it makes you
22 wonder what is on the top of it, right? I mean, you
23 would do the same thing that I'm doing because I
24 can't see the top of it. So I'm testifying on
25 something I can't see entirely.

1 Q. No. I understand.

2 A. That make me feel uncomfortable.

3 Q. Yeah. That is the top line, but it's
4 partially cut off. I understand.

5 A. So you can try your question and I can try
6 to answer, but --

7 Q. Let me see what I was going to ask and --
8 you know, I don't want to do that to you. So let's
9 just move on. I understand your concern there.

10 (At this time, Plaintiff's Exhibit 27 was
11 marked for identification purposes.)

12 Q. Let's go to the next one. This is Exhibit
13 27, and, again, it was produced in response to our
14 discovery requests. And if you could take a look at
15 that, and it's two pages. We'll show you the second
16 page first. That's all that's on the second page.

17 A. Okay.

18 Q. All right. Go to the first page.

19 A. I think I've read it.

20 Q. Okay. And by the way, who is Brian
21 Rogers?

22 A. He manages the international piece of
23 business for us with Slush Puppie.

24 Q. All right. And how does this -- do you
25 believe this email evidenced some confusion between

Frozen Brothers and ICEE?

A. I think this is a customer asking about how to sell Slush Puppie because they're not interested in Slushy Jack.

Q. So it sounds like they know the difference between Slush Puppie and Slushy Jack; right?

A. I think that would be a stretch for me to come a conclusion based off of this. I think they're asking about where can I find Slush Puppie and not Slushy Jack. That's what it says. We prefer Slush Puppie.

Q. Got it. So we really can't either way from this; right?

A. Well, again, I think they're confused on where to get Slush Puppies because somebody's told them our supplier has stopped.

Q. Thank you, Mr. Fachner.

(At this time, Plaintiff's Exhibit 28 was marked for identification purposes.)

Q. Let's move on to the next exhibit, 28. So these are a series of similar documents. Let's just take a look at the first couple ones. So they're each on one page. There's an exchange of information on one page. What is this first document 7374? I'm using the ICEE Bates number at

1 **the bottom.**

2 A. So it's one document? This is one
3 document on this page, is what you're saying?

4 Q. That's what I'm saying, yes. I have a few
5 of them consecutively so they'll be the same
6 exhibit. So this is one document.

7 A. Okay. And then your question was?

8 Q. **What is this document?**

9 A. It looks like a lead that must have come
10 in to the ICEE company.

11 Q. **And it's from a potential customer of
12 ICEE?**

13 A. Well, actually it looks like it is a
14 customer of ICEEs. It's not real well written, but
15 it says, Sent details to Derek at Vimto sell ICEE in
16 my store company.

17 Q. **Got it. Yes. Right. Is there any
18 evidence of confusion here on this one-page document
19 between ICEE and Frozen Brothers?**

20 A. As this document sits right here, I'm not
21 seeing the confusion.

22 Q. **Let's go to the next page, Dave.**

23 A. Was this part of the same trial or is this
24 --

25 Q. **No. I'm sorry. Good question. It's a**

1 different -- completely, it's a separate document
2 that was produced. It's not an email string. But
3 it is similar in format to the one before. So if
4 you could take a look at that, Mr. Fachner, and tell
5 me what that is.

6 A. A request for a Slush Puppie machine.

7 Q. I don't see any evidence in this one
8 either of confusion between Frozen Brothers and
9 ICEE; right?

10 A. As I'm reading this document here today, I
11 don't see that.

12 Q. Okay. There's a few of these. Let's just
13 look at two more.

14 MR. ZALUD: Let's go to the next
15 page, Dave.

16 Q. (BY MR. ZALUD) Similar formated document
17 to the two we previously looked at, Mr. Fachner?

18 A. Yes, it is similar.

19 Q. And, again, is there -- do you see any
20 evidence of confusion from this one page email
21 exchange between Frozen Brothers and ICEE?

22 A. I don't.

23 Q. This will be the last one.

24 MR. ZALUD: Next page, Dave.

25 Q. (BY MR. ZALUD) Similar type of document,

1 **Mr. Fachner?**

2 A. This is different.

3 **Q. Tell me what it is and how it's different.**

4 A. This is referencing an Internet page that
5 they cannot find, that is no longer there.

6 **Q. So different in that sense, but is it a
7 customer or prospective customer? Is that --**

8 A. This, I probably start to believe was
9 confusion. Again, because we don't own the domain
10 rights or the websites that we were able to convert
11 over so had he been able to go to those and be led
12 to the right spot, he wouldn't be confused. So this
13 one I do see a confusion on, yes.

14 **Q. Okay. Let's do one last one.**

15 MR. ZALUD: Next page, Dave.

16 **Q. (BY MR. ZALUD) And similar questions, Mr.
17 Fachner, I could ask them or feel free to just
18 respond.**

19 A. I don't see the confusion on this one
20 page.

21 **Q. That might be all the exhibits I'm going
22 to have. We've talked about these websites and
23 domain names kind of tangentially during the
24 deposition, but let me ask you this: Do you have
25 any evidence that any domain name owned by Frozen**

1 Brothers is used or displayed in the sale or
2 advertising of services that are rendered in
3 commerce using the Slush Puppie trademark?

4 A. If I understood your question -- that's
5 really broad. I mean anywhere, at any spot in the
6 U.S.? I mean maybe you have to answer that question
7 -- or ask that question one more time. I'm not sure
8 I understood it correctly.

9 Q. I'll pare it down then. Do you have any
10 evidence that Frozen Brothers is on some domain name
11 it's using -- it owns right now marketing Slush
12 Puppie branded products or services in commerce?

13 A. No, but I have evidence where you can go
14 to a domain name and it's a dead end, which would
15 imply there's no longer that brand.

16 Q. And how about this: Do you have any
17 evidence that currently in the present day, Frozen
18 Brothers is placing the Slush Puppie mark on goods
19 or containers or displays that are then sold in
20 commerce?

21 MR. WOLFSOHN: If you can testify to
22 it, go ahead.

23 A. We looked at a picture earlier.

24 Q. (BY MR. ZALUD) And that was the one of --
25 there were two photos. One of the front of the

1 machine and one of the -- some other part of the
2 machine. Is that the one you're talking about?

3 A. Yes, but the front of the machine isn't
4 always facing the customers. It could have been the
5 back of the machine that's facing the customer.

6 Q. I understand that. I just meant --

7 A. You're distinguishing the two as if you
8 think that means that it's behind the counter. And
9 most of our locations, the machine sits on the front
10 counter and the back is facing the customer.

11 Q. I understand what you're saying. I was
12 just distinguishing them as different parts of the
13 machine.

14 A. Yeah. Very confusing, you're right.

15 Q. Wait. I'm right about what?

16 A. How confusing it is to have two different
17 brand names on one machine.

18 Q. Any other examples like that that you're
19 aware of?

20 A. Not off the top of my head.

21 Q. Okay. Let me think here.

22 MR. ZALUD: Not the next one. We
23 don't need -- we already covered that.

24 THE WITNESS: How long are we
25 scheduled for today?

1 MR. WOLFSOHN: 5:00. He's only got
2 one minute.

3 MR. ZALUD: I only have one more
4 question and I really mean that, so perfect timing.

5 Skip the one after that.

6 A. My timing is around a bio break. So if we
7 had one question, that's sounds great. If you have
8 two questions, it doesn't sound so good.

9 **Q. (BY MR. ZALUD) Lawyers -- I'm not
10 exaggerating. It's one question.**

11 MR. ZALUD: Not the next one, so it's
12 the second last --

13 (At this time, Plaintiff's Exhibit 32
14 was marked for identification purposes.)

15 **Q. (BY MR. ZALUD) Last exhibit, last
16 question. This is Exhibit 32, and I'll tell you
17 what it is. It's the -- you may have seen it. It's
18 ICEE's brief in support of its motion for
19 preliminary injunction. Have you seen this before?**

20 A. I have.

21 **Q. No detailed for questions for you. Let's
22 just go to the next page. So the part I bracketed,
23 it says, Our heritage: We are Frozen Brothers, a
24 company created from a union of family businesses,
25 that back in 1974 introduced the United Kingdom,**

1 Europe, and Scandinavia to a frozen beverage called
2 Slush Puppie. Do you see that?

3 A. I do.

4 Q. Based on your history in the industry and
5 your relationship over the years with Slush Puppie
6 Limited, is this statement factually true?

7 A. Well, I certainly was not around this
8 business in 1974, so I don't know that I can
9 accurately determine whether this is accurate or
10 not.

11 Q. All right. So you don't know whether it's
12 accurate or inaccurate based on the fact you weren't
13 in the business in 1964 or in this part of the
14 business?

15 A. We were not in this part of the business
16 in 1974.

17 Q. All right? I wasn't kidding, Mr. Fachner.
18 I have no further questions for you.

19 A. Okay. Thank you.

20 Q. Thank you. I'm done. I appreciate your
21 time. We'll see you Monday.

22 - - -

23 (Deposition concluded at 5:02 p.m.) - - -
24

1 THE STATE OF OHIO,)) SS:

2 NOTARY CERTIFICATE

3 COUNTY OF MEDINA.) I, Dave Tackla,
4 Christine A. Schirripa, a Reporting Instructor, and
5 Notaries Public within and qualified, do hereby
6 certify that the within-named to testify the truth,
7 the whole truth and nothing testimony then given by
8 him was by me reduced to afterwards prepared and
9 produced by means of is a true and correct
10 transcript of the testimony

11 I do further certify that this deposition
12 was caption specified, and was completed without

13 I do further certify that I am not a
14 counsel, or otherwise financially interested in

15 I do further certify that I am not, nor is
16 affiliated, under a contract as defined in Civil

17 IN WITNESS WHEREOF, I have hereunto set my
18 Ohio, on this 27th day of August, 2021.

19 A. David Tackla

20 A. David Tackla

21 My Commission Expires: 08-12-24

23 Christine Schirripa

24 Christine Schirripa

25 My Commission Expires 11-26-21

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